84-30

CASE NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1983

CHARLES G. COPELIN,

Petitioner,

vs.

STATE OF ALASKA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALASKA

DANIEL WESTERBURG
SUZANNE C. PESTINGER
BIRCH, HORTON, BITTNER,
PESTINGER and ANDERSON
1127 West Seventh Avenue
Anchorage, Alaska 99501
(907) 276-1550
ATTORNEYS FOR PETITIONER

90 pp

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QUESTION PRESENTED FOR REVIEW

A motorist suspected of drunk driving is stopped by a State Trooper and instructed to leave his car. The motorist complies and is ordered to perform various field sobriety tests to determine if he is intoxicated. The motorist requests permission to first call his lawyer for advice. The request is denied. The tests are performed and the results are later used against the motorist at his drunk driving trial.

The following issue is presented: Did the trooper's actions deny the motorist his right to fundamental fairness, guaranteed under the Fourteenth Amendment to the United States Constitution, requiring suppression of the results of the field sobriety tests from trial?

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The Opinion of the Alaska Court of Appeals, affirming Charles Copelin's conviction for drunk driving, was issued on February 17, 1984, and is reported at 676 P.2d 608 (Alaska App. 1984). A copy of the Opinion is attached as Appendix "A". The Alaska Supreme Court's ORDER denying Mr. Copelin's PETITION FOR HEARING was issued on April 18, 1984. The ORDER has not been officially reported. A copy is attached as Appendix "B".

A related Opinion issued by the Alaska Court of Appeals on October 15, 1981, is officially reported at 635 P.2d 492 (Alaska App. 1981), and is attached as Appendix "C". A related Opinion of the Alaska Supreme Court issued on February 18, 1983, is reported at 659 P.2d 1206 (Alaska 1983), and is attached as Appendix "D".

JURISDICTIONAL STATEMENT

On July 7, 1983, Mr. Copelin was convicted by the District Court for the State of Alaska, Third Judicial District at Anchorage, of violating former AS 28.35.030, Alaska's Drunk Driving law. An earlier conviction for the same incident had been vacated by the Alaska Supreme Court on February 18, 1983, in Copelin v. State, 659 P.2d 1206 (Alaska 1983) (Appendix "D").

Judgment was entered upon the conviction on July 7, 1983, (Appendix "E") and an appeal was timely perfected to the Alaska Court of Appeals which affirmed the conviction on February 17, 1984, in Copelin v. State, 675 P.2d 608 (Alaska App. 1984) (Appendix "A"). A Petition for Hearing was timely filed with the Alaska Supreme Court, which denied the Petition without Opinion on April 18, 1984. (Appendix "B").

The jurisdiction of this court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution

Fourteenth Amendment...No state shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

Alaska Statutes

Former AS 28.35.030: Driving While Under the Influence of Intoxicating Liquor or Drugs. (a) A person who, while under the influence of intoxicating liquor, depressant, hallucinogenic or stimulant drugs or narcotic drugs as defined in AS 17.10.230(13) and AS 17.12.150(3) operates or drives an automobile, motorcycle or other motor vehicle in the state, upon conviction, is

punishable by a fine of not more than $1,000, or by imprisonment for not more than one year, or by both...

STATEMENT OF THE CASE

A. Factual Background.

Charles Copelin was driving his car in Anchorage, Alaska, in September of 1979, when he was stopped by a State Trooper who suspected that he was intoxicated. The trooper told Mr. Copelin to leave his car; Mr. Copelin complied. The trooper then ordered him to perform various field sobriety tests. Mr. Copelin asked permission to first call his lawyer for advice. The trooper denied the request and again told Mr. Copelin to perform the tests. Mr. Copelin complied. According to the trooper, Mr. Copelin's poor performance indicated he was intoxicated.

The trooper arrested Mr. Copelin, took him to the station house and ordered him to perform field sobriety tests before a video tape camera. The trooper also asked Mr. Copelin to take a breathalyzer test. Mr. Copelin again asked permission to call his lawyer for advice and the request was again denied. He then refused to take a breathalyzer test or perform any additional field sobriety tests. All of Mr. Copelin's actions and statements were video-taped and recorded. He was later charged with drunk driving.

Prior to trial, Mr. Copelin moved to suppress the station house video tape--arguing that his constitutional and statutory rights to counsel had been violated and the video tape was a fruit of the violation. The trial court denied the motion; the case proceeded to trial and Mr. Copelin was convicted. The

Alaska Supreme Court reversed the conviction on appeal. The court ruled that Mr. Copelin's statutory right to counsel under AS 12.25.150(b) had been violated and the station house video tape should have been suppressed. Copelin v. State, 659 P.2d 1206 (Alaska 1983). The case was remanded for retrial.

Prior to the second trial, Mr. Copelin sought to suppress, in addition to the video tape, all evidence gathered after his first request for counsel had been denied, including the results of the field sobriety tests taken at the scene of the arrest. The motion was denied; the case proceeded to trial and Mr. Copelin was again convicted.

Mr. Copelin timely perfected an appeal to the Alaska Court of Appeals, arguing that evidence of the field sobriety tests had been obtained in violation of his statutory and

constitutional rights to counsel and should have been suppressed. The constitutional argument was based upon both Sixth Amendment and Fourteenth Amendment grounds. The Alaska Court of Appeals affirmed the conviction in Copelin v. State, 676 P.2d 608 (Alaska App. 1984) (Appendix "A").

Mr. Copelin timely filed a PETITION FOR HEARING with the Alaska Supreme Court under AS 22.07.030 and Rule 302(a) of the Alaska Rules of Appellate Procedure. The petition was denied on April 18, 1984. (Appendix "B").

B. How the Federal Question Was Raised Below.

1. First Trial.

Mr. Copelin's due process argument was first raised in his October 15, 1979 MOTION TO SUPPRESS filed before his first trial:

> A presentation of said tapes at trial would be in violation of defendant's...right to funda-

> mental fairness under the Fourteenth Amendment to the United States Constitution...

This theory was argued at page 5 of the MEMORANDUM OF POINTS AND AUTHORITIES supporting the MOTION.

The trial court rejected the due process argument at a pre-trial motion hearing on October 29, 1979

> And I think ultimately it boils down to due process. And I don't think due process is denied when you are talking about preserving the evidence so six independent jurors can look at it and decide, as opposed to a swearing contest between witnesses for one side and witnesses for the other side as to what kind of state the person is in. [Tr. 43.]

2. First Appeal to Alaska Court of Appeals.

On page 15 of Mr. Copelin's November 10, 1980 brief to the Alaska Court of Appeals, he argued that he had a due process right under the Fourteenth Amendment to telephone his lawyer for advice before taking sobriety tests.

Pages 11 through 15 of his March 10, 1981 Reply Brief also discuss the Fourteenth Amendment/Fundamental Fairness issue.

3. First Petition for Hearing to the Alaska Supreme Court.

The Alaska Supreme Court granted Mr. Copelin's first Petition for Hearing and the briefing earlier filed with the Court of Appeals was transferred to the higher court for consideration. The Alaska Supreme Court reversed the Court of Appeals and vacated the conviction in Copelin v. State, 659 P.2d 1206 (Alaska 1983). The court ruled that Mr. Copelin's statutory right to counsel under AS 12.25.150(b) had been violated. It never reached the constitutional issues. Id. at 1215, fn. 19.

4. Second Trial.

The Alaska Supreme Court ordered suppressed the station house video tape from Mr. Copelin's retrial. After remand, Mr. Copelin filed a MOTION IN

LIMINE in an effort to extend the suppression order to include all evidence gathered after he had first asked to call his lawyer at the scene of his arrest, including the results of his field sobriety tests. At a June 27, 1983, motion hearing, the District Court found that Mr. Copelin first requested counsel at the scene of his arrest, prior to the field sobriety tests. However, it refused to suppress any evidence gathered by the arresting trooper prior to arrival at the trooper station where a telephone would have been first available to Mr. Copelin.

5. Second Appeal to Alaska Court of Appeals.

Mr. Copelin was convicted after his second trial and again perfected an appeal to the Alaska Court of Appeals. At page 8 of his Opening Brief he argued that the trooper's refusal to allow him to call his lawyer violated his right to

fundamental fairness guaranteed under the Fourteenth Amendment. He also incorporated by reference his Opening and Reply briefs filed with the Alaska Court of Appeals and relied upon by the Alaska Supreme Court in his earlier appeal.

The Alaska Court of Appeals summarily rejected Mr. Copelin's constitutional arguments in Copelin v. State, 676 P.2d 608, 609 (Alaska App. 1984).

6. Second Petition for Hearing to the Alaska Supreme Court.

Mr. Copelin again raised the Fourteenth Amendment/Due Process argument in his second Petition for Hearing to the Alaska Supreme Court, at page 11 of the PETITION. The PETITION was summarily denied without opinion. (See Appendix "D".)

REASONS FOR GRANTING THE WRIT

The Petitioner's Due Process Rights Were Violated

Introduction

The procedural history of this case is somewhat complex but the limited issue presented here for review is not: When a motorist requests to call his lawyer before performing field sobriety tests, is his due process right to fundamental fairness violated if the request is denied and he is forced to perform the tests without the benefit of counsel's advice?

Since his request for counsel was made and denied prior to formal judicial proceedings, Mr. Copelin is not claiming that his Sixth Amendment right to counsel was violated. See Kirby v. Illinois, 406 U.S. 682 (1972). Further, since the evidence in question (results of field sobriety tests) is non-testimonial in

nature, Mr. Copelin is not claiming that his Fifth Amendment rights were violated. See Schmerber v. California, 384 U.S. 757 (1966).

A. Cases Recognizing a Motorist's Due Process Right to Telephone His Lawyer for Advice Before Sobriety Testing.

Numerous cases have recognized that a motorist being investigated on a drunk driving charge has a due process right to telephone his lawyer before deciding whether to participate in sobriety testing. This right is triggered when the motorist specifically requests permission to call his lawyer and is contingent upon his ability to make contact without unduly delaying the testing. See e.g., Smith v. Cada, 562 P.2d 390 (Ariz. App. 1977); State v. Hill, 178 S.E.2d 462 (N.C. 1971); City of Tacoma v. Heater, 409 P.2d 867 (Wash. 1966); Heles v. South Dakota, 530 F. Supp. 646 (D. S.D. 1982), vac. as moot

652 F.2d 201 (8th Cir. 1982); and Hall v. Secretary of State, 231 N.W.2d 396 (Mich. App. 1975).

Typical of these cases is Hall v. Secretary of State, supra, reviewing the revocation of a motorist's drivers license for the motorist's refusal to take a breathalyzer test. The Michigan Court of Appeals vacated the revocation after learning that before refusing the breathalyzer test, the motorist had requested permission to call his lawyer for advice and the request had been denied. The court held that the ability to call and consult with one's attorney before deciding whether to take or refuse sobriety testing was a fundamental right, protected under the Fourteenth Amendment. Id. at 398-399.

B. Mr. Copelin Was Prejudiced By Being Prohibited From Calling His Lawyer for Advice.

Had Mr. Copelin been permitted to call his lawyer, he probably would have been advised not to take any field sobriety tests. In Alaska, motorists have given "implied consent" to take breathalyzer tests. Under the implied consent law in effect in 1979, refusing to take a breathalyzer test resulted in a ninety-day license suspension. See former AS 28.35.031 and AS 28.35.032.

However, there has never been in Alaska a corresponding "implied consent" law relating to field sobriety tests. There is nothing in Alaska's Motor Vehicle Code requiring motorists to perform field sobriety tests upon instructions of a police officer. Accordingly, a motorist can perform field sobriety tests upon the request of a police officer, or refuse to perform

them, as he sees fit. See Colorado v. Ramirez, 609 P.2d 616, 618 at n. 4 (Col. 1980).

In the present case, Mr. Copelin's request to call his lawyer for advice was denied and he was therefore not in a position to intelligently consider his rights and balance the pros and cons of performing the field sobriety tests. In such a situation, the results should be suppressed. As the Supreme Court of Minnesota stated in Prideaux v. Department of Public Safety, 247 N.W.2d 385, 395 (Minn. 1976):

> When the driver has been coerced into making a complicated decision without the assistance of counsel required by this opinion, he should not be bound by that decision, since he might have otherwise made it differently. Therefore, if such a driver elected to take the test, the result should be suppressed. If he elected not to take the test, he should not be deemed to have unreasonably refused it and his driver's license should

not be revoked. [Emphasis added.]

Furthermore, had Mr. Copelin been given permission to call his lawyer, the lawyer might have assisted him in gathering exculpatory evidence. See State v. Hill, supra at 467.

C. No Harmless Error.

The trial court's error in admitting the results of the field sobriety tests was not harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18 (1967). Since no breathalyzer was given and the station house video tape had been suppressed from the second trial, testimony concerning Mr. Copelin's performance of the field sobriety tests was perhaps the State's most important evidence of Mr. Copelin's intoxication.

D. Importance of the Issue.

Considering the large number of drunk driving cases prosecuted in this country, the Alaska Court of Appeals'

decision condoning a police officer's denial of a motorist's request to call his lawyer is a significant question of law, having substantial public importance to others than the parties in the present case.

One of the distinguishing features of a typical drunk driving prosecution is that the defendant is ordinarily an otherwise law-abiding citizen. Indeed, an average citizen's only serious involvement with the criminal justice system may be as a defendant in a drunk driving prosecution. Accordingly, any serious curtailment of a motorist's right to call his lawyer for advice should be closely scrutinized by this court. Many Americans have an inherent distrust of the legal system in general. If in his only contact with that system, a citizen learns that his good-faith request to contact his lawyer for advice can be

ignored by the police with impunity, his distrust and disrespect for that system will be reinforced.

Drunken driving laws in this country are extremely complex and state legislatures have a tendency to revise these laws in important respects on an annual basis. Very few motorists on American highways are likely to be familiar with the intricacies of these laws. This complexity is bound to spawn an occasional motorist who, when taken into custody on suspicion of drunk driving, will request a brief telephone conference with his attorney to obtain advice as to the law, his rights and possible penalties.

When such a request is made, fundamental fairness requires that all sobriety testing be temporarily discontinued and the motorist be given an opportunity to call his lawyer for

advice. When that request is denied, as it was here, any evidence subsequently gathered by the prosecuting authorities should be suppressed.

CONCLUSION

For all of the above reasons, Mr. Copelin respectfully requests that his PETITION FOR WRIT OF CERTIORARI be granted.

DATED this 18th day of June, 1984, at Anchorage, Alaska.

BIRCH, HORTON, BITTNER,
PESTINGER and ANDERSON
Attorneys for Petitioner

BY: _____
Daniel Westerburg

BY: _____
Suzanne Pestinger

APPENDIX A

THE COURT OF APPEALS OF THE
STATE OF ALASKA

CHARLES G. COPELIN, Appellant,	)	File No. A-35
v.	)	OPINION
STATE OF ALASKA, Appellee.	)	[No. 343 - February 17, 1984]

Appeal from the District Court of the State of Alaska, Third Judicial District, Anchorage, William H. Fuld, Judge.

Appearances: Daniel Westerburg, Birch, Horton, Bittner, Pestinger and Anderson Anchorage, for Appellant. David C. Stewart, Assistant District Attorney, Victor C. Krumm, District Attorney, Anchorage, and Norman C. Gorsuch, Attorney General, Juneau, for Appellee.

Before: Bryner, Chief Judge, Coats and Singleton, Judges.

SINGLETON, Judge

Charles Copelin was convicted of driving while intoxicated. AS 28.35.030. He appealed his conviction which was ultimately reversed. Copelin v. State, 659 P.2d 1206 (Alaska 1983). The supreme

court held that the police had violated Copelin's statutory right to counsel by refusing to give him an opportunity to contact counsel prior to taking a breathalyzer examination and prior to performing field sobriety tests in front of a video camera. On remand Copelin was tried a second time. The trial court followed the supreme court's decision and excluded all evidence of Copelins' actions at the police station. The court nevertheless permitted the arresting officer to testify regarding Copelin's inability to perform field sobriety tests at the scene of his investigatory stop. Copelin was convicted a second time and he again appeals. He argues that his right to contact counsel attached at the time of the investigatory stop because he was in custody at the time. He does not contend that he was under arrest at that time. See Howard v. State, 664 P.2d 603,

608-11 (Alaska App. 1983) (distinguishing between on the scene investigations, investigatory stops and arrests).

We are satisfied that the Alaska Supreme Court rejected Copelin's arguments in Copelin v. State, 659 P.2d 1206 (Alaska 1983) and Anchorage v. Geber, 592 P.2d 1187 (Alaska 1979). We read those cases as holding that any right to consult counsel does not attached until after an arrest. See AS 12.25.150(b). Here, the field sobriety tests were administered prior to arrest as part of an investigatory stop. Consequently, Copelin had no statutory right to contact counsel until he was taken to the police station.

Copelin nevertheless argues that he had a constitutional right to contact counsel before being required to perform field sobriety tests. He relies upon Walker v. State, 652 P.2d 88 (Alaska

1982) and Blue v. State, 558 P.2d 636 (Alaska 1977). In Svedlund v. Anchorage, 671 P.2d 378, 382 (Alaska App. 1983), we rejected a similar argument and held that any right to contact counsel prior to taking field sobriety tests or submitting to a breathalyzer examination was a creature of statute and not the state or federal constitutions. In Svedlund, we concluded that Blue and, and by implication, Walker were distinguishable. Id. We adhere to that decision.

The judgment of the district court is AFFIRMED.

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF ALASKA

CHARLES G. COPELIN,	)	
	)	
Petitioner,	)	Supreme Court
	)	No. S-368
vs.	)	
	)	ORDER
STATE OF ALASKA,	)	
	)	
Respondent.	)	
	)	

Court of Appeals No. A-35
Superior Court No. 3AN 79-5399 Cr.

Before: Burke, Chief Justice, Rabinowitz, Matthews, Compton and Moore, Justices.

On consideration of the petition for hearing filed March 5, 1984 and the response to the petition filed March 14, 1984,

IT IS ORDERED:

The petition for hearing is denied.

Entered by direction of the court at Anchorage, Alaska on April 18, 1984.

CLERK OF THE SUPREME COURT

/S/

DAVID A. LAMPEN

[Certificate of Service]

APPENDIX C

THE COURT OF APPEALS OF THE
STATE OF ALASKA

CHARELS G. COPELIN,	)	File No. 5453
	)	
Appellant,	)	O P I N I O N
	)	
v.	)	[No. 51 -
	)	October 15, 1981]
STATE OF ALASKA,	)	
	)	
Appellee.	)	
	)	

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Ralph E. Moody, Judge, on appeal from the District Court, Third Judicial District, Anchorage, John Mason, Judge.

Appearances: Daniel Westerburg, Birch, Horton, Bittner, Monroe, Pestinger & Anderson, Anchorage, for Appellant. Elizabeth H. Sheley, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Wilson L. Condon, Attorney General, Juneau, for Appellee.

Before: Bryner, Chief Judge, Coats and Singleton, Judges.

PER CURIAM.

Copelin appealed his district court OMVI conviction to the superior court where it was affirmed, and he renews his appeal in this court. He alleges that

the trial court erred: (1) in failing to suppress videotape evidence taken after his request for an opportunity to telephone counsel was refused, and (2) in considering past refusals to take breathalyzer tests in imposing sentence. We find these contentions controlled by prior decisions of our supreme court. In light of such authority, we conclude that there was no error, and we therefore affirm.

A suspect has no constitutional right to contact or consult an attorney before: (1) submitting to field sobriety tests, including videotaping, or (2) determining whether or not to submit to a breathalyzer or blood test. Anchorage v. Geber, 592 P.2d 1187 (Alaska 1979).[1]

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1. In Graham v. State, ___ P.2d ___, Op. No. 2403 (Alaska, Sept. 4, 1981), the supreme court in a split decision affirmed a summary revocation of Graham's operator's license based on her refusal

(continued)

Copelin's reliance on AS 12.25.150(b)[2] is misplaced. That section permits one detained to contact counsel or a friend to arrange bail or legal representation; it was not designed as a vehicle for securing immediate legal advice. See Eben v. State, 599 P.2d 700, 709 n.27 (Alaska 1979). We conclude that

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1. Continued.

to submit to a breathalyzer examination and both majority and minority assumed no right to consult counsel prior to deciding whether to submit to a breathalyzer exam. We believe that the clear tenor of that opinion supports our conclusion here.

2. AS 12.25.150(b) provides:

> Immediately after an arrest, a prisoner shall have the right to telephone or otherwise communicate with his attorney and any relative or friend, and any attorney at law entitled to practice in the courts of Alaska shall, at the request of the prisoner or any relative or friends of the prisoner, have the right to immediately visit the person arrested.

any consultation rights Copelin had under AS 12.25.150(b) did not arise until after completion of the field and station sobriety tests, including the videotaping thereof.

Finally, we find no error in the trial judge's consideration of Copelin's prior OMVI arrests and his consistent refusal to submit to breathalyzer tests since the attendant circumstances were verified and Copelin was given an opportunity to rebut. Nukapigak v. State, 562 P.2d 697 (Alaska 1977), aff'd on rehearing, 576 P.2d 982 (Alaska 1978). We believe Puller v. Municipality of Anchorage, 574 P.2d 1285 (Alaska 1978), is distinguishable. There the court precluded use of a defendant's refusal to submit to a breathalyzer test as evidence of guilt at trial based on statutory construction. Subsequently, the legislature modified the statute to unequivocally

permit use of a refusal to take the breathalyzer as evidence of guilt. A fortiori, we believe it can be considered at sentencing.[3]

The judgment of the superior court affirming the judgment of the district court is AFFIRMED.

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3. Judge Singleton concurs, stating,

> I believe Geber and Eben are distinguishable and I would be prepared to dissent in reliance on, inter alia, Prideaux v. State, 247 N.W.2d 385, 391-94 (Minn. 1976); Spradling v. Deimeke, 528 S.W.2d 759, 764-65 (Mo. 1975); Siegwald v. Curry, 319 N.E.2d 381, 384-88 (Ohio App. 1974); State v. Fitzsimmons, 610 P.2d 893 (Wash. 1980), U.S. app. pending, 93 Wash.2d 436; and see People v. Gursey, 292 N.Y.S.2d 416, 418 (N.Y. App. Div. 1968), but for Graham v. State, ___P.2d___, Op. No. 2403 (Alaska, Sept. 4, 1981), wherein both the majority and minority, albeit in dicta appear to read Geber and Eben as does the majority here.

APPENDIX D

THE SUPREME COURT OF THE STATE OF ALASKA

CHARLES G. COPELIN, Appellant, v. STATE OF ALASKA, Appellee.	)	File No. 5453
JOE RAY MILLER, Appellant, v. ANCHORAGE, a Municipal Corp., Appellee.	)	File No. 5708 O P I N I O N [No. 2617 - February 18, 1983]

Petition for Hearing from the Court of Appeals of the State of Alaska, on Appeal from the Superior Court, Third Judicial District, Anchorage, Ralph E. Moody, Judge, on Appeal from the District Court, Third Judicial District Anchorage, John Mason and Warren Tucker, Judges.

Appearances: Daniel Westerburg and Stanley Lewis, Birch, Horton, Bittner, Monroe, Pestinger & Anderson, Anchorage for Appellant Copelin. Jeffrey M. Feldman and James D. Gilmore, Gilmore and Feldman, Anchorage, for Appellant Miller. Elizabeth H. Sheley, Assistant

Attorney General, Anchorage, Wilson L. Condon, Attorney General, Juneau, for Appellee State of Alaska. David G. Berry, Municipal Prosecutor, Theodore D. Berns, Municipal Attorney, Anchorage for Appellee Anchorage.

Before: Burke, Chief Justice, Rabinowitz, Connor, Matthews and Compton, Justices.

CONNOR, Justice.
COMPTON, Justice, dissenting in part.
BURKE, Chief Justice, dissenting in part.

In separate cases, Charles G. Copelin and Joe Ray Miller were convicted of violating state and municipal drunken driving prohibitions. These convictions were upheld by the Court of Appeals.[1] We granted Copelin and Miller's petitions for hearing[2] in order to review whether

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1. Copelin v. State, 635 P.2d 492 (Alaska App. 1981); Miller v. Anchorage, Summ. Disp. No. 54 (Alaska App., November 5, 1981).

2. AS 22.07.030 and Appellate Rule 302(a)(1).

the police may refuse the request of one who is arrested for driving while intoxicated to consult an attorney before deciding whether to submit to a breathalyzer test. A second issue, raised only in the case of Copelin, is whether a judge may consider one's refusals to submit to such brethalyzer tests in sentencing proceedings.

We have concluded that when a person is arrested for operating a motor vehicle in violation of state or local drunken driving ordinances, and requests to contact an attorney, AS 12.25.150(b) and Alaska Criminal Rule 5(b) require that the arrestee be afforded a reasonable opportunity to do so before being required to decide whether or not to submit to a breathalyzer test. Where, as here, the arrestee is denied that opportunity, subsequently obtained

evidence must be suppressed, and we accordingly reverse these two cases.

FACTS

On September 16, 1979, Charles G. Copelin was arrested for operating a motor vehicle while under the influence of intoxicating liquor in violation of state law. AS 28.35.030.[3] On April 16, 1979, Joe Ray Miller was arrested for operating a motor vehicle while his blood alcohol level exceeded .10 percent, in violation of a municipal ordinance

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3. Former AS 28.35.030, under which Copelin was charged, reads as follows:

> "Driving while under the influence of intoxicating liquor or drugs. (a) A person who, while under the influence of intoxicating liquor, depressant, hallucinogenic or stimulant drugs or narcotic drugs as defined in AS 17.10.230(13) and AS 17.12.150(3) operates or drives an automobile, motorcycle or other motor vehicle in the state, upon conviction, is punishable by a fine of not more than $1,000, or by (continued)

3. Continued.

imprisonment for not more than one year, or by both and the court shall impose a minimum sentence of imprisonment of not less than three consecutive days. Upon a subsequent conviction within five years after a conviction under this section, the court shall impose a minimum sentence of imprisonment of not less than 10 consecutive days. The execution of sentence may not be suspended nor may probation or parole be granted until the minimum imprisonment provided in this section has been served, nor may imposition of sentence be suspended, except upon the condition that the defendant be imprisoned for no less than the minimum period provided in this section, nor may the punishment provided for in this section be reduced under AS 11.05.150. In addition, his operator's license shall be revoked in accordance with AS 28.15.210(c). In addition a person convicted under this statute shall undertake, for a term specified by the court, that program of alcohol education or rehabilitation which the court, after consideration of any information compiled under (b) of this section, funds appropriate.

(b) Except as prohibited by federal law or regulation, every provider of treatment programs to which persons are ordered under (a) (continued)

ANCHORAGE, ALASKA MUNICIPAL CODE § 9.28.030 (1978).[4]

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3. Continued.

of this section shall supply the Alaska court system with the information regarding the condition and treatment of those persons as the supreme court may require by rule. Information compiled under this subsection is confidential and may only be used by a court in sentencing a person convicted under (a) of this section, or by an officer of the court in preparing a presentence report for the use of the court in sentencing a person convicted under (a) of this section."

4. Former ANCHORAGE, ALASKA MUNICIPAL CODE § 9.28.030 (1978), under which Miller was charged, reads as follows:

"Driving with 0.10% or greater blood alcohol.

A. It shall be unlawful for any person to operate, drive or be in actual physical control of an automobile, motorcycle or other motor vehicle in the municipality at such time as there is 0.10% or more by weight of alcohol in his blood, or 100 milligrams or more of alcohol per 100 milliliters of his blood, or 1.10 grams or more of alcohol per 210 liters of his breath.
(continued)

Following their traffic stops both Copelin and Miller were taken into custody and transported to law enforcement headquarters. Both Copelin and Miller were asked to submit to breathalyzer examinations and both responded to this request by expressing a desire to contact their attorneys first. Permission was denied. Both Copelin and

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4. Continued

B. To be considered valid under the provisions of this section, a chemical analysis of the person's breath shall have been performed according to methods approved by the Alaska Department of Health and Social Services. If it is established at trial that a chemical analysis of breath was performed according to techniques, methods and standards of training approved by the Alaska Department of Health and Social Services, there is a presumption that the test results are valid and further foundation for introduction of evidence is unnecessary."

Miller were told that they did not have the right to contact counsel until after they decided whether to take the test.[5]

Copelin did not take the breathalyzer test, did not perform requested field sobriety tests, and was videotaped throughout this refusal. Miller did take the breathalyzer test. Following their respective arraignments, Copelin moved to suppress the videotape of his actions and Miller moved to suppress the results of his breathalyzer test. These motions produced conflicting results in the district and superior courts and eventually made their way to

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5. Copelin was not permitted to contact anyone until nearly seven hours after his arrest. Miller was told, "You can call an attorney after you blow in the Breathalyzer."

the Court of Appeals.[6] The Court of Appeals affirmed the convictions of both Copelin and Miller, holding that there was no error in the failure to suppress Copelin's videotape, no error in the failure to suppress Miller's breathalyzer test results, and no error in considering Copelin's past refusals to submit to breathalyzer tests in imposing sentence.

STATUTORY RIGHT

Copelin and Miller contend that they had a statutory right of access to counsel which was violated by law

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6. COPELIN
On October 29, 1979, Copelin's motion was partially granted as the district court ordered some sections of the audio portion of the videotape turned off during playback. Interrogation by the officer in violation of Miranda and Copelin's "refusal" to take the breath test were not heard by the jury. The jury did see a very angry, hostile, and frustrated Copelin as he repeatedly asked to speak with his attorney and the officer repeatedly told him he could not. On November 15, 1979, the jury returned a (continued)

6. Continued.

verdict of guilty. After considering Copelin's refusals to submit to breathalyzer examinations on three separate occasions (including the present one) Copelin was sentenced by the district court. Copelin appealed to the superior court where the district court's judgment and sentence were affirmed on June 26, 1980. An appeal was filed in this court, and the matter was transferred to the Court of Appeals.

MILLER

On June 21, 1979, Miller entered a plea of nolo contendere to the .10 charge of the complaint, preserving the right to litigate and, if necessary, appeal, the issues raised in his pre-trial motion to suppress pursuant to Cooksey v. State, 524 P.2d 1251 (Alaska 1974). On August 13, 1979, the district court granted Miller's motion to suppress, set aside his plea, and dismissed the case. The Municipality of Anchorage then petitioned the superior court to review the district court's order granting the motion to suppress. On November 28, 1979, the superior court reversed the order of the district court, and remanded the case for the imposition of sentence. On November 6, 1980, the nolo contendere plea was reinstated, a judgment of conviction was entered, and Miller was sentenced. Miller then appealed to the superior court. Because the issue had already been considered by the court upon the Municipality's petition for review, further proceedings were transferred to the Court of Appeals.

enforcement officers' denial of their requests to speak with their attorneys. We agree.

AS 12.25.150 sets forth the rights of a prisoner after arrest. Subsection (b) of that statute provides:

> "Immediately after an arrest, a prisoner shall have the right to telephone or otherwise communicate with his attorney and any relative or friend, and any attorney at law entitled to practice in the courts of Alaska shall, at the request of the prisoner or any relative or friends of the prisoner, have the right to immediately visit the person arrested." (Emphasis added).

The language of this statute is clear and unambiguous and mandates that every arrestee have the right to telephone or otherwise communicate with his attorney immediately.[7] This mandate was viewed by the legislature as sufficiently important to warrant criminal and civil

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7. This statute is paralleled by Alaska Criminal Rule 5(b):
"Rights of Prisoner to Communicate with Attorney or Other Person.
(continued)

penalties for its willful or negligent violations.[8]

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7. Continued.

Immediately after his arrest, the prisoner shall have the right forthwith to telephone or otherwise to communicate with both his attorney and any relative or friend. Any attorney at law entitled to practice in the courts of Alaska, at the request of either the prisoner or any relative or friend of the prisoner, shall have the right forthwith to visit the prisoner in private." (Emphasis added).

8. AS 12.25.150 continues:

"(c) It shall be unlawful for any officer having custody of a person so arrested to willfully refuse or neglect to grant any prisoner the rights provided by this section. A violation of this section is a misdemeanor, and, upon conviction, the offender is punishable by a fine of not more than $100, or by imprisonment for not more than 30 days, or by both.

(d) In addition to the criminal liability in (c) of this section, an officer having a prisoner in custody who refuses to allow an attorney to visit the prisoner when proper application is made therefore shall forfeit and pay to the party aggrieved the sum of $500, recoverable in a court of competent jurisdiction."

Relaying on this court's interpretation of AS 12.25.150(b) in Eben v. State, 599 P.2d 700 (Alaska 1979), the Court of Appeals found Copelin and Miller's invocation of that statute to be misplaced.[9] In Eben, we stated:

> "[AS 12.25.150(b)] is not concerned with implementing an arrestee's right to consult privately with his or her attorney, but with right to contact an attorney, relative or friend for the purpose of arranging bail or legal representation."

Id. at 710 n.27.

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9. The defendant in Eben was arrested and booked on a double homicide charge. At the police station, after being advised of his rights, the defendant told police that he would sign the rights waiver form after he had telephoned his girlfriend. The officers remained in the room during the defendant's telephone conversation and heard the defendant utter incriminating statements. This court rejected the defendant's argument that statements made during the exercise of an arrestee's rights under AS 12.25.150(b) to "telephone or otherwise communicate" with counsel and friends, should be excluded as a matter of law.

However, there is nothing in the language of the statute which suggests any limitations on the type or nature of communication which an arrestee may have with his attorney following arrest. In fact, in Eben, this court noted:

> "[W]e caution that to the extent deemed appropriate in light of the circumstances, law enforcement officials should administer AS 12.25.150(b) in a manner which will permit a prisoner to communicate in privacy with his attorney, relative, or friend."

Id. By recommending that private communication be allowed where feasible, this court implicitly recognized that the opportunity to consult and communicate with an attorney and to receive legal advice was also a contemplated purpose of the statute.[10] To the extent that

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10. The ABA Standards Relating to Criminal Justice, the Defense Function § 2.1 provide:

> "Every jurisdiction should guarantee by statute or rule of court the (Continued)

language in Eben indicates that the sole purpose of AS 12.25.150(b) is to aid an arrestee in the attainment of bail or legal representation, it is disavowed. We hold that one intended purpose of AS 12.25.150(b) is to provide an arrestee with the opportunity to obtain legal advice.

We now must determine what the legislature intended when it gave an arrestee "the right to telephone or otherwise communicate with his attorney" "immediately after an arrest" in the context of a driving while under the influence (DWI) arrest. The state and the municipality argue the right to

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10. Continued.

right of an accused person to prompt and effective communication with a lawyer and should require that reasonable access to a telephone or other facilities be provided for that purpose." (Emphasis added).

consult an attorney "immediately" means after any sobriety tests are administered. They argue that since the evidence which these tests are designed to detect dissipates quickly, it would be impracticable, unreasonable, and contrary to the intent of the implied consent statute[11] to allow prior consultation.

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11. The Alaska Implied Consent Statute provides in part:

> "Sec. 28.35.031. Implied consent. A person who operates or drives a motor vehicle in this state shall be considered to have given consent to a chemical test or tests of his breath for the purpose of determining the alcoholic content of his blood if lawfully arrested for an offense arising out of acts alleged to have been committed while the person was operating or driving a motor vehicle while under the influence of intoxicating liquor. The test or tests shall be administered at the direction of a law enforcement officer who has reasonable grounds to believe that the person was operating or driving a motor vehicle in this state while under the influence of intoxicating liquor."

We disagree. "Immediately" means just that. This "destruction of evidence" argument does not preclude the limited statutory right of access to counsel that Copelin and Miller are seeking.

In Anchorage v. Geber, 592 P.2d 1187 (Alaska 1979), we weighed the benefits of assistance of counsel against the possibility that requiring such assistance following an arrest for driving while intoxicated and prior to field sobriety tests would interfere with the acquisition of relevant evidence.[12] Id. at 1192. We are mindful of the important state interest in obtaining reliable evidence of an arrestee's blood alcohol level and the fact that alcohol concentration will dissipate with the passage of time.

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12. Geber does not directly control this case. In Geber one of the defendants argued unsuccessfully that (continued)

12. Continued.

before requiring her to perform certain field sobriety tests, the police should have informed her that she had the right to have an attorney present if she could obtain his presence within a reasonable period of time. While we held that the police have no duty to advise a suspect of any right to counsel, we did not hold that the police may refuse the specific requests to contact counsel that were made in the instant cases. Other courts have recognized that there is a vast difference between a flat refusal to afford access to counsel after it is requested and a failure to advise or warn a defendant of his rights. See, e.g., People v. Craft, 270 N.E.2d 297 (N.Y. 1971). Secondly, while we held in Geber that there is no right to have an attorney present at the field sobriety tests, we did not hold that there is no right merely to contact or communicate with counsel before deciding whether or not to submit to such test. Other jurisdictions, while finding a constitutional or statutory right to consult an attorney by phone, have held that the arrestee does not have the right to demand physical presence of the attorney before taking a breathalyzer test. Spradling v. Deimeke, 528 S.W.2d 759, 765 (Mo. 1975); Price v. North Carolina Dept. of Motor Vehicles, 245 S.E.2d 518, 521-22 (N.C. 1978); McNulty v. Curry, 328 N.E.2d 798, 803 (Ohio 1975). Geber dealt with neither the statutory right to counsel nor the administration of a breathalyzer test.

However, the proper procedure by which breathalyzer examinations are to be given in Alaska as set forth in 7 ALASKA ADMIN. CODE § 30.020 requires that the test subject be observed by the test operator for a [sic] least 15 minutes immediately prior to testing to assure that the subject does not vomit or place anything in his mouth which might invalidate the test result. Since a minimum of a 15 minute wait is necessary before administering the breathalyzer test, no additional delay is incurred by acceding to a request to contact an attorney during that time.[13]

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13. While 15 minutes is the minimum period of delay, the arrestee will have a longer period of time in which to contact his attorney where the test operator is not yet ready to administer the test. Such a rule does not impose any greater delay in testing other than that which is inherent in the test administration process.

The statutory right to contact and consult with counsel is not an absolute one (which might involve a delay long enough to impair testing results), but, rather, a limited one of reasonable time and opportunity that can be reconciled with the implied consent statutes.[14]

The municipality argues that it is not clear whether Miller would have been able to contact his attorney within any specific time period. The state points out that Alaska does not by statute establish a period of time during which the breathalyzer must be administered to guide the court in prescribing a time limit. Both of these observations are

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14. The burden of proof is on the government to show that an accused demanded an unreasonable amount of time and thereby interfered with the "prompt and purposeful investigation" of the case. Blue v. State, 558 P.2d 636, 642 (Alaska 1977).

valid. Reasonableness will depend on the circumstances of each case, such as the amount of time between the stop and the transportation to the station, when the request is made, and how much time is needed to set up the test. If the attorney cannot be contacted within a reasonable time the suspect must decide without the advice of counsel, whether to take the breathalyzer test.[15] As both Copelin and Miller were denied any opportunity whatsoever to contact their attorneys, they were denied their statutory rights.

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15. Although an arrestee may be without the advise of counsel, he is entitled to a warning by the police. The police are not required to inform the arrestee that he has the right to refuse; however, if he does refuse, he must be advised of the consequences flowing from his refusal and be permitted to reconsider his refusal in light of that information. Wirz v. State, 577 P.2d 227 (Alaska 1978).

The state and the municipality next contend that since there is "no right to refuse" to take the breathalyzer tests, any right to consult an attorney would be meaningless to the accused. In Graham v. State, 633 P.2d 211 (Alaska 1981), we stated:

> "Under Alaska law, as in most other jurisdictions, one arrested for operating a motor vehicle while under the influence of intoxicating liquor has no constitutional or statutory right to refuse to submit to a breathalyzer test. Palmer v. State, 604 P.2d 1106, 1110 (Alaska 1979); Wirz v. State, 577 P.2d 227, 230 (Alaska 1978). Nor does he or she have the right to have counsel present before being required to take the test. Anchorage v. Geber, 592 P.2d 1187, 1192 (Alaska 1979). Since there is no right of refusal, we have also held that it is not necessary to inform the person arrested that he or she can refuse the test, in order to render the test results admissible. Palmer v. State, 604 P.2d 1110."

Id. at 214 (footnote omitted).

The prosecuting authorities in the present case have seized upon the

language that there is "no right to refuse" to take the breathalyzer test to argue that there is no issue as to which the advice of an attorney might help to preserve any of the accused's rights. The state goes a step further, insisting that it cannot conceive of any ethical or lawful assistance which a criminal defense attorney could render for a client arrested for drunk driving who is asked to take a breathalyzer test.

These arguments misperceive what is meant by "no right to refuse." There may be no right to refuse a test for determining blood alcohol level in the constitutional sense. See Schmerber v. California, 384 U.S. 757, 771, 16 L.Ed.2d 908 (1966). And, there may be no right to refuse in the statutory sense, in that the arrestee will suffer adverse legal consequences in the form of suspension or

revocation of his driver's license. AS 28.35.032. However, the statute does not deprive an accused of the power to refuse to submit to the test: if the suspect refuses to submit to a breath test, no chemical analysis of his breath, blood, or urine may be given. Anchorage v. Geber, 592 P.2d 1187 (Alaska 1979) (interpreting AS 28.35.032).[16]

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16. The legislature has recently amended AS 28.35 by adding a new section, AS 28.35.035. Under subsection (a) of this new section, an arrestee who causes death or physical injury to another person no longer has the ability to refuse chemical testing of his blood or breath. The tests may be administered without the consent of the arrestee. Subsection (b) of the new section provides that where the arrestee is unconscious or otherwise incapable of refusal, the implied consent of AS 28.35.031 remains operative, and the police may conduct chemical testing of breath or blood. Such an arrestee would have no effective choice to refuse testing.

(Continued)

Therefore, the law has deliberately given the arrested person a choice between two very different alternatives and potential sanctions. The arrested driver must weigh and evaluate a number of different factors. He may only be vaguely aware of some of these and need not be informed of all of them by the police.[17]

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16. Continued.

The holding in this case, that an individual has the right to telephone an attorney prior to deciding whether to take the breathalyzer test, is restricted to those cases in which the arrestee, under AS 28.35, is still left with the choice of refusing to take the breathalyzer test.

17. Among the possible ramifications under present law (effective January 1, 1983):

A. If the driver refuses to take the breathalyzer test:

1. A chemical test cannot be given unless the arrest results from an accident that causes death or (continued)

17. Continued.

physical injury to another person. AS 28.35.035(a).

2. The driver's license or non-resident privilege to drive will be revoked or suspended for three (3) months, AS 28.35.032(b), if:

a. the arresting officer had reasonable grounds to believe the driver had been operating a motor vehicle while under the influence; if

b. the driver refused to submit after being advised this would result in suspension or revocation of this license; and if

c. the driver was fairly informed of the nature and accuracy of the test, the expertise of operator, etcetera.

3. If the driver who refuses has been convicted of driving while intoxicated or of refusal to submit to a breath test the suspension or revocation will be for one (1) year. AS 28.35.032(d).

4. Refusal to submit to the chemical test of breath is a class A misdemeanor. AS 28.35.032(f). Conviction for refusal carries a minimum sentence of imprisonment of not less than 72 consecutive hours. And, upon a subsequent conviction within five years after such a conviction or of a conviction for driving while intoxicated in this or any other state, the minimum (continued)

17. Continued.

sentence is ten consecutive days unless the subsequent conviction is within one year of the previous conviction, in which case the minimum sentence is twenty consecutive days. In addition, a person convicted of this misdemeanor must enroll in a program of alcohol education or rehabilitation that the court finds appropriate. AS 28.35.032(g).

5. The driver may still be prosecuted for driving under the influence and convicted, despite his refusal to take the breathalyzer test. The driver's refusal to submit to the breathalyzer test, as well as any other field sobriety test, will be admissible evidence in a civil or criminal proceeding under the revised statute. AS 28.35.032(e).

6. Refusing to submit to a breathalyzer may hinder the state's case against a driver, but it may also deprive the driver of exculpatory evidence.

7. A driver who receives a refusal suspension can obtain a limited license by instituting a separate civil action and demonstrating to the court requisite hardship. AS 28.35.032.

8. There may be serious collateral consequences to a suspension, involving one's driving record, insurance premiums and even employment.

(Continued.)

The decision as to whether to comply with an arresting officer's request to take a sobriety test is not a simple one. Clearly, an attorney's advice at this stage would not only be ethical and lawful, but helpful. The choice which an individual driver must make is a

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17. Continued.

B. If the driver takes the breathalyzer test:

1. Under ANCHORAGE, ALASKA MUNICIPAL CODE § 9.28.020 B.2 and the revised AS 28.35.030(2), a reading above .10 is conclusive proof of driving while intoxicated. On the other hand, a low breathalyzer reading can establish innocence under AS 28.35.033(a)(1) and ANCHORAGE, ALASKA MUNICIPAL CODE § 9.28.023 A.1.

2. A person who submits to a breathalyzer test may have a qualified person of his own choosing administer a chemical test in addition to the chemical test administered at the direction of a law enforcement officer. AS 28.35.033(e). There is no requirement that the driver be advised of this right. Palmer v. State, 604 P.2d 1106 (Alaska 1979).

meaningful and binding one that will affect him in subsequent proceedings. Where the important chemical testing procedures are not unreasonably delayed, the driver should, upon request, have the benefit of the advice of his own counsel, with whom he has a statutory right to communicate. Given the conclusive nature of the evidence which the accused is asked to provide, this decisive point may be the only occasion when this statutory right is of any use.

The prosecuting authorities finally argue that to apply the statutory right to communicate with one's attorney at the pre-decision stage would thwart the legislative intent underlying the implied consent statute. The courts in a growing number of jurisdictions recognize at least a limited right to communicate with counsel prior to making the decision to

submit to chemical testing. While many of the cases cited in the briefs can be distinguished on significant statutory differences, see Wirz v. State, 577 P.2d 227, 230 n.12 (Aiaska 1978), some cases have found a pre-decision right to communicate with counsel based upon state statutes similar to AS 12.25.150(b) or court rules similar to Criminal Rule 5(b). These cases have found no inconsistency between these statutes and court rules and implied consent statutes.[18] The prosecuting authorities have failed to cite and we have failed to find any case that denies a limited statutory right to counsel if a statute similar to AS 12.25.150(b) or Criminal Rule 5(b) exists.

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18. State v. Vietor, 261 N.W.2d 828, 830-31 (Iowa 1978) (Statute required peace officer to "permit that person, (continued)

18. Continued.

without unnecessary delay after arrival at the place of detention, to call, consult, and see a member of his or her family or an attorney of his or her choice."); Prideaux v. State Dept. of Public Safety, 247 N.W.2d 385, 391-94 (Minn. 1976) (Statute required officer to "admit any resident attorney retained by or on behalf of the person restrained, or whom he may desire to consult, to a private interview at the place of custody."); Gooch v. Spradling, 523 S.W.2d 861, 865-66 (Mo. 1975) (Statute and court rules provided the right "to consult with counsel or other persons in his behalf at all times"); McNulty v. Curry, 328 N.E.2d 798, 802-03 (Ohio 1975) (Statute required that "[a]fter the arrest, detention, or any other taking into custody of a person . . . such person shall be permitted forthwith facilities to communicate with an attorney at law of his choice who is entitled to practice in the courts of this state . . ."); State v. Fitzsimmons, 620 P.2d 999 (Wash. 1980), aff'd 610 P.2d 893 (Wash. 1980) after vacation of judgment and remand in 449 U.S. 977, 66 L.Ed.2d 240 (1980). (Court rule required that "[a]t the earliest opportunity a person in custody who desires counsel shall be provided access to a telephone . . . and any other means necessary to place him in communication with a lawyer").

Exclusionary Rule

The question remains as to whether denial of a statutory right to counsel requires the suppression of subsequently obtained evidence. Copelin and Miller argue that invocation of the exclusionary rule is appropriate for violations of AS 12.25.150(b) even though there is no provision for doing so in the statute and the statute itself provides for civil and criminal sanctions. The state argues that the exclusionary rule is reserved for constitutional violations, and that since this remedy was not included in the statute, it was not thought by the legislature to be appropriate.

In State v. Sundberg, 611 P.2d 44 (Alaska 1980), we elected not to apply the exclusionary rule to a violation of AS 12.25.080 (forcible arrest statute). While noting that the primary purpose of the exclusionary rule is deterrence of

future illegal conduct by police, we also concluded that other deterrents might render adoption of an exclusionary rule unnecessary, given society's interests in crime prevention and the apprehension and trial of offenders. Id. at 52. Given those considerations and the absence of a history of excessive force in arrests by police officers, we concluded that the imposition of the exclusionary rule for violations of the forcible arrest statute would at best achieve only a marginal deterrent effect.

Under a Sundberg analysis we reach the opposite conclusion with regard to AS 12.25.150(b). In Sundberg we distinguished the forcible arrest situation from a "conventional search and seizure . . . involv[ing] a relatively static factual circumstance where the object of police efforts is to obtain

evidence of criminal conduct." Id. The breathalyzer test, in contrast to the hot pursuit of fleeing felons, provides time for reflection before action and, like a traditional search, consists of intentional efforts by the police to obtain evidence. Given these distinguishing factors, we believe that application of the exclusionary rule will serve to deter future illegal police conduct.

Additionally, a violation in this type of case, as opposed to a violation of the forcible arrest statute, has an effect on the defendant's ability to present a defense at trial. Here, the defendants were deprived of their statutory right to counsel, and evidence gathered after the right to counsel has been denied should be excluded from trial. See Escobedo v. Illinois, 378

U.S. 478, 12 L.Ed.2d 977 (1964). In deciding to apply the exclusionary rule in a situation similar to that presented here, the Minnesota Supreme Court stated:

> "[W]hat sanctions should attend violation of the right? While we note that § 481.10 contains civil and criminal penalties against the police officer, these alone are not sufficient to fully vindicate the driver's right. When the driver has been coerced into making a complicated decision without the assistance of counsel required by this opinion, he should not be bound by that decision, since he might have otherwise made it differently. Therefore, if such a driver elected to take the test, the results should be suppressed. If he elected not to take the test, he should not be deemed to have unreasonably refused it and his driver's license should not be revoked."

Prideaux v. State Dept. of Public Safety, 247 N.W.2d at 395.

Application of the exclusionary rule to Miller requires that the breathalyzer test results be suppressed. Copelin, however, presents a more difficult case. The State argues that the evidence

against Copelin was "de facto suppressed" since Copelin refused to take the test, and the portion of the videotaping having to do with his refusal was not heard by the jury. However, we conclude that the videotape evidence of his actions after he requested to speak with his attorney should have been suppressed entirely. Had he been allowed to consult with an attorney he may have elected to take the breathalyzer, and gained exculpatory evidence. Furthermore, had he been granted the right to consult with his attorney, it is likely that the videotaped events (his growing anger at not being able to talk with his attorney and his consequent verbal abuse of the police officer) would never have occurred.

In conclusion, we find that when a person is arrested for operating a motor

vehicle while intoxicated and asks to consult a lawyer, AS 12.25.150(b) and Criminal Rule 5(b) mandate that the arrestee be afforded the right to do so before being required to decide whether to submit to a breathalyzer test. If the suspect is denied that opportunity, subsequent evidence, whether in the form of the test results or the refusal to submit to it, shall be inadmissible at a later criminal trial. This statutory right is limited, however, to circumstances when it will not unreasonably hinder the police investigation. If the person arrested is unable to reach an attorney by telephone or otherwise within a reasonable time, the accused may be required to elect between taking the test and refusing it without the aid of counsel. As both Copelin and Miller were denied the

opportunity to contact counsel, these cases must be REVERSED.[19]

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19. As we have concluded that Copelin and Miller's statutory rights were violated and that evidence obtained subsequent to these violations must be suppressed, we need not consider the argument that an accused has a constitutional right to consult with counsel prior to deciding whether to submit to intoxication tests.

Our decision to reverse also eliminates the need to address Copelin's argument that the district court erred in imposing his sentence.

COMPTON, Justice, dissenting in part.

I disagree with the court's holding that evidence obtained subsequent to a refusal to allow an OMVI suspect to contact counsel in violation of AS 12.25.150(b) must be excluded. In support of this result, the court relies on State v. Sundberg, 611 P.2d 44 (Alaska 1980). I believe that Sundberg and other Alaska cases discussing the exclusionary rule support the opposite conclusion.

Determining whether an exclusionary remedy is appropriate requires a balancing of the purpose behind excluding illegally obtained evidence with the interest in admitting reliable evidence in those proceedings. State v. Sears, 553 P.2d 907, 912 (Alaska 1976) (applicability of exclusionary remedy in probation revocation proceedings). The

primary purpose of the exclusionary rule is deterrence of future illegal conduct by the police. Sundberg, 611 P.2d at 51 (footnote omitted). The rationale of this rule is that if the police are aware that the fruits of their illegal conduct will be excluded from trial, then the police will cease such conduct.

After noting the existence of potential deterrents in criminal sanctions, police departmental proceedings, civil rights actions, and tort suits, we concluded in Sundberg that an exclusionary rule would not provide significant additional deterrence to excessive force arrests. Id. at 51-52. In the present case, there are additional reasons why an exclusionary remedy is not necessary for violations of AS 12.25.150(b).

First, unlike the situation in Sundberg, where there were no built-in sanctions for violations of the forcible arrest statute, AS 12.25.150 clearly and expressly sets forth both criminal and civil sanctions against police for the deprivation of an arrestee's rights under the statute. AS 12.25.150(c) provides:

> It shall be unlawful for any officer having custody of a person so arrested to wilfully refuse or neglect to grant any prisoner the rights provided by this section. A violation of this section is a misdemeanor, and, upon conviction, the offender is punishable by a fine of not more than $100, or by imprisonment for not more than 30 days, or by both.

AS 12.25.150(d) provides:

> In addition to the criminal liability in (c) of this section, an officer having a prisoner in custody who refuses to allow an attorney to visit the prisoner when proper application is made therefore shall forfeit and pay to the party aggrieved the sum of $500, recoverable in a court of competent jurisdiction.

Thus, the legislature created a statutory right to "telephone or otherwise communicate" with counsel immediately after arrest, AS 12.25.150(b), and provided deterrence for violations of this right by authorizing criminal prosecution of a police officer for willfully refusing or neglecting to allow an arrestee to exercise this right. An officer convicted under this statute has a misdemeanor on his record, faces a fine up to $100 and/or imprisonment up to thirty days, and faces a civil judgment of $500 payable to the aggrieved arrestee.

Second, unlike the potential deterrents discussed in Sundberg, the criminal sanction would simply require the arrestee to make a criminal complaint. The state would be charged with the good faith obligation to

investigate and, if warranted, to prosecute and bear the cost of such prosecution; a judge would determine the degree of punishment rather than an interested police department official; there would not be the time delays associated with civil suits. I believe that a police officer would more likely be deterred by the potential criminal record and jail time than by application of the judicially created exclusionary rule, which simply means that one of the officer's many arrests failed to culminate in a conviction. Therefore, it is clear that the minimal, if any, deterrent effect that an exclusionary remedy would have considering the civil and criminal deterrents already built into AS 12.25.150 is far outweighed by the significant interest in admitting

probative evidence gained from a breathalyzer test.

Sundberg implies an additional reason for not imposing an exclusionary remedy for violations of the excessive force statute, namely, when the officers are acting in good faith:

> [W]e are of the view that imposition of the exclusionary rule on the particular facts of the case at bar was clearly unwarranted . . . [because] the officer . . . was proceeding in accordance with existing departmental directives, and the degree of force permissible under the necessary and proper phraseology of AS 12.25.080 had not been previously construed by this court.

611 P.2d at 52 (footnote omitted).

In this case, the police quite likely believed in good faith that Miller and Copelin had no right to consult counsel before taking the breathalyzer. Even the court of appeals, relying on Eben v. State, 599 P.2d 700, 710 n.27 (Alaska 1979), understood AS 12.25.150 to

be merely a bail statute and therefore believed it was not applicable in the context of an arrest followed by a breathalyzer test administration. Copelin v. State, 635 P.2d 492, 493-94 (Alaska App. 1981). Thus, this is not a situation where the police acted in blatant disregard of an individual's constitutional and statutory rights; rather, they were engaged in conduct that they reasonably believed was legal. Only after this decision is published and the police become aware that an individual does have a limited statutory right to consult an attorney prior to taking a breathalyzer test does the deterrence rationale become operative.

In short, application of the exclusionary rule is intended to deter future illegal conduct. This deterrence is amply provided by the decision in this

case, which makes it clear for the first time that the conduct is illegal, and by the criminal sanctions imposed by the legislature for officers engaging in the illegal conduct.

The court's holding ignores these two significant factors of Sundberg militating against applying an exclusionary remedy and attempts to distinguish this case from Sundberg on the ground that the breathalyzer situation is more like a "'conventional search and seizure . . . involv[ing] a relatively static factual circumstance where the object of police efforts is to obtain evidence of criminal conduct.'" _____P.2d at _____ (Op. No. ___ at 21) (quoting Sundberg, 611 P.2d at 52). Given that administration of a breathalyzer test "provides time for reflection before action" and that "like

a traditional search, [it] consists of intentional efforts by the police to obtain evidence," id. the court opinion concludes that an exclusionary remedy is needed as an additional deterrent. It neglects to state, however, that Sundberg distinguished conventional search situations on the ground that "the fleeing offender--arrest situation . . . often requires law enforcement officials to make rapid decisions within the framework of fluid and confused factual situations which do not permit significant reflection, the obtaining of legal advice, or the intervention of, and decision from, a neutral and detached judicial officer." 611 P.2d at 52. I believe that the breathalyzer situation is in reality somewhere between the "traditional search" situation and the "hot pursuit" circumstance. Although the

factual situation is not likely to be as "fluid and confused" as hot pursuit, the police officer is nonetheless going to have to make an educated guess, without help from counsel, whether a "reasonable time" has passed so that he may put the suspect to his choice. At this point, with no evidence to the contrary, I think the court must assume that such a decision will be made in good faith by law enforcement personnel.

In other words, application of the exclusionary rule at this stage is premature. As we stated in Sundberg:

> [W]e think it appropriate to caution that our holding is not immutable. In the event a history of excessive force arrests is shown, demonstrating that existing deterrents are illusory, we will not hesitate to reexamine the question of whether an exclusionary deterrent should be fashioned in the situation where evidence is obtained as a result of an arrest which is effectuated by excessive force.

Id. (footnote omitted). Cf. Elson v. State, _____P.2d_____, _____n.31 (Op. No. 2615 at 28, n.31) (Alaska February 28, 1983) (same cautionary instruction given after permitting illegally seized evidence to be used in sentencing proceedings). Similarly, in the event that the clearly delineated statutory right to consult with counsel is violated in the future and that the civil and criminal sanctions are shown not to deter these violations, then this court should not hesitate to apply the exclusionary rule.

I join the court's disposition of all other issues in the petition for hearing.

BURKE, Chief Justice, dissenting in part.

I share the views expressed by my dissenting colleague, Justice Compton. At this point in time, we have no reason to believe that the penalty provisions of AS 12.25.150 will not be vigorously enforced, now that the requirements of the statute have been made clear. Nor is there reason to believe that those provisions will not effectively deter future violations of the statute. If and when it can be demonstrated that the police and the prosecuting authorities are shirking their responsibility, or that the deterrent effect of the penalty provisions is illusory, we should not hesitate to apply the exclusionary rule. In my judgment, however, the court's application of the rule at this time is unwarranted.

APPENDIX E

[Court Date Stamp
of July 7, 1983]

IN THE DISTRICT COURT FOR THE
STATE OF ALASKA

AT ANCHORAGE
[X] STATE OF ALASKA

vs. JUDGMENT (COUNT___)
CASE NO.3ANS-79-5399CR

CHARLES G. COPELIN

DOB: 5-13-51 Date of Offense: 9-16-79
Statute or Ord. 28.35.030
Crime Charged: OMVI
Driver's License No. (for traffic cases only):_____
PLEA: [X] Not Guilty [ ] Guilty
[ ] No Contest
TRIAL [ ] Court [X] Jury

The defendant was found and adjudged:

[ ] NOT GUILTY. IT IS ORDERED that the defendant is acquitted and discharged.

[X] GUILTY of the crime named above.

[ ] GUILTY OF _____

Any appearance bond in this case is exonerated.

SENTENCE (STAYED PENDING APPEAL)

[ ] Imposition of sentence is suspended and defendant is placed on probation until _____, 19___.

[X] Sentence is imposed as follows:

[X] Defendant is fined $500 with $-0- suspended. The unsuspended $500 is to be paid 7-7-83 STAYED PENDING APPEAL.

[X] Defendant is committed to the custody of the Commissioner of Health and Social Services to serve 60 days with 50 days suspended. The unsuspended 10 days are to be served STAYED PENDING APPEAL.

[ ] Defendant is ordered_____

[X] Defendant is placed on probation until JULY 7, 1984.

[X] Defendant's driver's license or privilege to apply therefor is
[X] revoked [ ] suspended [ ] limited for ONE (1) (year) and any such license is to be immediately surrendered to the court. License Number: STAYED PENDING APPEAL.

[X] The conditions of defendant's probation are: NO SIMILAR VIOLATIONS FOR ONE YEAR.

7-7-83 /s/LeAnn Baker
EFFECTIVE DATE ACTING MAGISTRATE

[Court Seal]

WILLIAM H. FULD
TYPE OR PRINT JUDGE'S NAME

[Certificate of Service]

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-30

CHARLES G. COPELIN,

Petitioner,

vs.

STATE OF ALASKA,

Respondent.

RESPONSE OF THE STATE OF ALASKA TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALASKA

NORMAN C. GORSUCH
ATTORNEY GENERAL OF THE
STATE OF ALASKA

By: DAVID MANNHEIMER
Assistant Attorney General

Office of Special Prosecutions and Appeals
1031 West Fourth Ave.,
Suite 318
Anchorage, AK 99501
(907) 279-7424

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JURISDICTION

Copelin has invoked this Court's jurisdiction under 28 U.S.C. § 1257(3). While Copelin satisfies the requirement of having received a final judgement of the highest state court in which a decision could be had, the State believes that Copelin failed to preserve the Fourteenth Amendment due process issue that he now seeks to have this Court answer. This will be discussed more fully in the Argument portion of the State's response.

QUESTION PRESENTED

When the driver of a motor vehicle is stopped by a police officer because of erratic driving and is asked to perform "field sobriety tests" (tests of physical coordination and mental dexterity) at the site of the stop, must the officer break off his investigative activities when the motorist indicates a desire to talk to an attorney -- similar to the rule enforced in custodial interrogation situations -- or can the officer reiterate his request that the motorist perform the field sobriety tests?

(Because of a dispute between Copelin and the State of Alaska as to the facts of the case, Copelin frames the issue differently. This factual dispute is explained in the statement of the case.)

STATEMENT OF THE CASE

Just before midnight on September 16, 1979, Alaska State Trooper Jeffrey Hall was at the end of his shift and was driving back to the state trooper station on Tudor Road in Anchorage. Looking into his rear-view mirror, Trooper Hall saw a pickup truck behind him swerve from the left-hand lane to the right-hand lane, nearly striking another car and nearly going over the curb at the side of the road. The truck continued its approach and passed Trooper Hall at a speed of 60 m.p.h.; the speed limit on Tudor Road was 50.

Trooper Hall activated his emergency lights and stopped the truck. The driver was the Petitioner, Charles Copelin. Copelin smelled of alcohol. When asked to produce his driver's license, Copelin handed Trooper Hall a VISA charge card. Trooper Hall asked Copelin to get out of the truck; Copelin staggered as he complied with the trooper's request.

At this point, the facts

asserted by Copelin diverge from the facts revealed by the record. Copelin asserts (page 4 of his petition to this Court) that when the state trooper requested that he perform the field sobriety tests, Copelin asked to be allowed to call an attorney first, and that the trooper specifically denied Copelin's request and ordered him to proceed with the field sobriety tests.

But the district court judge who presided over the evidentiary hearing on this question found that the conversation had been slightly different. As Copelin himself stated in his opening brief to the Alaska court of appeals, at page 3:

> The defendant indicated that he wished to telephone his attorney before agreeing to perform any sobriety tests. The defendant's requests were ignored by the trooper and he was instructed to complete the tests.

Copelin reiterated this version of the facts at page 5 of his brief to the court of appeals:

> District court judge Glenn Anderson ... determined, as a factual matter, that the defendant first requested counsel when Trooper Hall instructed him to perform field sobriety tests at the scene of his arrest. He also ruled, however, that Trooper Hall did not verbalize any denial of the defendant's request until after arrival at "C" detachment [the trooper station].

In other words, the hearing judge found that, while Copelin had indeed stated that he wanted to talk to an attorney, the state trooper had not specifically denied Copelin's request. Instead, Trooper Hall merely reiterated his request that Copelin perform the tests, and Copelin proceeded to do so.

Copelin was asked to do three tests: recite the alphabet, count backwards from one hundred, and balance on one leg. Copelin could do none of these things; his speech was slurred and his words and numbers were at times incoherent. (At the hearing, Copelin denied that he had even performed the tests.)

Upon the completion of these tests, Trooper Hall arrested Copelin and took him to the state trooper station. Here, Copelin was asked to take a breath test for determining the level of alcohol in his system, and he was also asked to repeat the field sobriety tests (so that his performance could be videotaped). Copelin again asked to be allowed to call an attorney, and it was at this point that the trooper expressly told Copelin he could not talk to an attorney until after he took the breath test.

Copelin thereupon refused to either take the breath test or to repeat the field sobriety tests; he grew angry and abusive. All of this was videotaped, and a portion of this videotape was played to the jury at Copelin's first trial. See Copelin v State, 659 P.2d 1206 (Alaska 1983), n.6 at 1209.

The Alaska supreme court reversed Copelin's conviction because of the state trooper's refusal to let Copelin call an attorney after he had been arrested and transported to the station. The court's ruling was based on

the provisions of Alaska Statute 12.25.-150(b), which grants an arrestee the right to immediately contact an attorney, a relative, or a friend as a matter of state law.

Copelin's case was remanded for retrial; all the evidence of his intoxication obtained after the police denied his request to telephone his attorney was suppressed. Copelin v State, 659 P.2d at 1215.

At his second trial, Copelin expanded his claim: he filed a motion to have Trooper Hall barred from giving any testimony regarding Copelin's performance of the field sobriety tests at the site of the initial traffic stop. He claimed that he had requested an attorney at this earlier time, and that the trooper had denied his request and ordered him to perform the tests.

As already stated, the judge who heard this motion concluded that, while Copelin had indicated he wanted to phone a lawyer, the state trooper had not told Copelin he was prohibited from calling a lawyer until after the tests.

Instead, the trooper had merely persisted in asking Copelin to perform the tests, and Copelin had then done so.

Copelin was convicted at this retrial, and he appealed to the Alaska court of appeals. Copelin argued that, even though AS 12.25.150(b) was phrased in terms of a citizen's rights following an "arrest", the statute should be interpreted as applying to any custody situation -- specifically, to the type of investigatory traffic stop in Copelin's case.

The court of appeals rejected Copelin's statutory interpretation, holding that the right to telephone an attorney conferred by AS 12.25.150(b) did not take effect until a person had been arrested. Thus the court ruled that, at the initial investigatory stop, Copelin's statement that he wanted to call an attorney did not oblige the state trooper to desist from all efforts to investigate Copelin's level of intoxication until the phone call could be made.

Copelin also argued to the court of appeals that the trooper's

investigatory stop triggered Copelin's right to counsel under the Alaska constitution. Copelin relied on two prior decisions of the Alaska supreme court in which the court had interpreted the "right to counsel" provision of the state constitution as extending broader protection than its federal counterpart. The court of appeals rejected this argument also. Copelin v State (II), 676 P.2d 608 (Alaska App. 1984).

Copelin petitioned the Alaska supreme court to review the decision of the court of appeals. Copelin relied on the same two arguments: that he had a statutory right to immediately contact an attorney under AS 12.25.150(b), and that he had a state constitutional right -- under the Alaska court's previous rulings on the scope of the state constitutional guarantee of right to counsel -- to contact an attorney before the state trooper proceeded with the initial investigatory stop.

The Alaska supreme court denied review, and Copelin has now petitioned this Court for a writ of certiorari to

the Alaska court of appeals, for review of its decision in Copelin (II), 676 P.2d 608 (Alaska App. 1984).

REASONS FOR DENYING THE WRIT

There are three reasons why this Court should not issue a writ of certiorari in this case. First, Copelin has not preserved any issue of federal right in his pleadings before the Alaska courts. Second, the facts upon which he bases his claim are at variance (on a matter of substance) with the findings entered by the hearing judge. Third, Copelin is asking this Court to take the precipitous step of redefining and expanding the federal guarantee of right to counsel in the area of investigative stops when there has been essentially no prior treatment of this issue in either the federal or the state courts.

I. COPELIN HAS NOT PRESERVED ANY ISSUE OF FEDERAL RIGHT UNDER THE FOURTEENTH AMENDMENT

As noted in the Statement of the Case, when Copelin appealed his conviction at the second trial he relied upon two arguments: (1) that Alaska Statute 12.25.150(b) gave him the right

to immediately contact an attorney before the trooper proceeded with the investigatory traffic stop, and (2) that even if the state statute did not apply to investigatory stops, he still had a constitutional right to contact a lawyer.

But an examination of the court of appeals's opinion and of Copelin's subsequent petition for hearing to the Alaska supreme court shows that Copelin was basing this second (constitutional) argument on the Alaska constitutional guarantee of right to counsel, not on the federal guarantee.

In the decision which Copelin seeks to have this Court review, the Alaska court of appeals described the legal issue this way:

> Copelin ... argues that he had a constitutional right to contact counsel before being required to perform field sobriety tests. He relies upon Walker v State, 652 P.2d 88 (Alaska 1982), and Blue v State, 558 P.2d 636 (Alaska 1977).

(Copelin v State (II), 676 P.2d at 609.)

The two cases relied upon by Copelin -- Walker and Blue -- are decisions of the Alaska supreme court in which the state guarantee of right to counsel was interpreted as being broader than the corresponding federal guarantee.

In Blue v State, the Alaska supreme court -- noting that no similar right existed at federal law -- held that an arrestee had a state constitutional right to the presence of an attorney at a pre-indictment lineup. 558 P.2d at 640-643.

In Walker v State, the Alaska supreme court confronted the issue of whether Blue should apply in circumstances where there was a need for a prompt identification. The court again explicitly noted that the question was one of state constitutional law, since no similar right to counsel at a pre-indictment lineup existed at federal law. 652 P.2d at 95-96.

Thus, it appears that Copelin based his arguments to the Alaska court of appeals on a state constitutional theory (because it appeared more promis-

ing than the corresponding argument under federal law).

This view of Copelin's position is substantiated by an examination of his petition for hearing to the Alaska supreme court. (Copelin's petition to the Alaska supreme court is included as Appendix A to the State's response.)

In his petition, Copelin reiterated his two arguments: that he had a statutory right to counsel, and that he had a constitutional right to counsel even if AS 12.25.150(b) did not apply to him.

It is true that, along with references to the right-to-counsel provisions of the Alaska constitution [Art. I, §§ 7 and 11], Copelin included the words "Sixth and Fourteenth Amendments" in his phrasing of the constitutional issue. See Appendix, page A-2. However, when it came time to argue the matter, Copelin relied exclusively on state constitutional grounds:

> The defendant urges the court to find a defendant's statutory right to counsel co-extensive with the collater-

> al constitutional right recognized in Blue v State, 558 P.2d 636 (Alaska 1977).
>
> In Blue, this court extended the constitutional right to counsel in Alaska to the investigatory stage by requiring the presence of a suspect's attorney at pre-indictment lineups, absent exigent circumstances. The defendant in Blue was not formally under arrest when the lineup occurred but the court nevertheless determined that he was "in custody" for purposes of determining his constitutional right to counsel.

(Appendix, pages A-10 & 11)

Here again, just as he did in the court of appeals, Copelin is arguing that, based on the Alaska supreme court's holding in Blue, he was entitled under the Alaska constitution to the presence of counsel at the investigatory traffic stop, even though he had not yet been arrested, much less formally charged with a crime. Copelin is clearly not relying on any federal authority for so broad an assertion of the right to counsel;

Copelin cites no federal cases for his assertion of a "constitutional" right to the presence of an attorney.

A little later in his petition, Copelin again addresses the constitutional guarantee of right to counsel, and again he is plainly relying on the Alaska constitutional guarantee:

> As indicated above, in Blue and Walker this court recognized that a suspect in custody is entitled to counsel at the investigatory stage of a prosecution absent exigent circumstances. ... Consistent with Blue, this court held in Loveless v State, 592 P.2d 1206 (Alaska 1979), that the constitutional right to counsel under the Alaska constitution is to be broadly interpreted "to protect the accused during proceedings that are investigatory in nature and which are conducted in an adversarial context". [592 P.2d] at 1210; citing Blue and Roberts v State, 458 P.2d 340 (Alaska 1969).

(Appendix, pages A-14 & 15)

The Blue and Roberts cases that

Copelin relies upon in this passage are instances in which the Alaska supreme court extended the state guarantee of right to counsel to areas where there was no similar federal guarantee, or where it was uncertain that federal law would grant the suspect similar protection. Blue has already been discussed. In Roberts, the court ruled that a suspect had a state constitutional right to the presence of an attorney when the police took a handwriting exemplar from him.

The only non-Alaska authority cited by Copelin in his petition to the Alaska supreme court is a group of decisions string-cited on page A-19. All of these cases deal with the right to consult an attorney after, not before, an arrest has been made.

In two of the cases -- City of Tacoma v Heater, 409 P.2d 867 (Wash. 1966), and State v Hall, 178 S.E.2d 462 (N.C. 1971) -- the defendants' convictions were reversed because the local police had enforced an arbitrary 4-hour post-arrest ban on any contacts with an

attorney.

In a another of the cases -- Scarborough v State, 261 So.2d 475 (Miss. 1972) -- the defendant's conviction was reversed because the defendant had asked to be allowed to take a chemical test following his arrest and had been refused. The court held that the police could not unreasonably impede the defendant's attempt to gather evidence.

In the last three state court decisions -- Hall v Secretary of State, 231 N.W.2d 396 (Mich. App. 1975), Prideaux v State Dept. of Public Safety, 247 N.W.2d 385 (Minn. 1976), and State v Welch, 376 A.2d 351 (Vt. 1977) -- the courts held that state law, not federal law, mandated that the arrested motorist have the opportunity to contact an attorney before taking a breath test. (The basis of decision in Welch is a little unclear, but was clarified in a later case involving the same defendant: State v Welch, 394 A.2d 1115 (Vt. 1978).)

The final case in this group is a federal district court decision, Heles v South Dakota, 530 F.Supp. 646 (D.S.D.

1982), vacated as moot 682 F.2d 201 (8th Cir. 1982). In this case, when the arrested motorist made his request for an attorney, he was told that such a request constituted a refusal to take the test and was grounds for revoking his driver's license. The arrestee finally contacted his attorney an hour later and, after talking to him, decided to take the breath test, but the police told him it was too late.

The district court first reviewed the state court decisions in this area and found that, of the courts which grant a right to counsel to a driver arrested for drunk driving, all but one had done so on the basis of a state statute or court rule. The district court found that there was essentially no federal law precedent on this subject. 530 F.Supp. at 650-651.

The court proceeded to rule in favor of the motorist, but its ruling was based on the fact that the motorist had been arrested and was thus entitled to an expanded right to consult an attorney, using an anology to the decision in

Miranda v Arizona, 384 U.S. 436 (1966).

In sum, none of the decisions cited by Copelin in his petition to the Alaska supreme court is authority for the federal constitutional claim he now advances to this Court in his petition for writ of certiorari -- that he is entitled to request the presence of an attorney at an investigatory traffic stop prior to any arrest, and that failure of the officer to immediately accede to such a request violates his rights under the due process clause of the Fourteenth Amendment.

All the decisions Copelin relied on in front of the Alaska supreme court either rested on state grounds, or were based on the rights triggered by arrest.

Based on this examination of Copelin's pleadings to the Alaska courts, the State of Alaska believes that Copelin should not be allowed to raise a federal claim to this Court because he failed to raise any such claim to the Alaska courts. While Copelin's petition to the

Alaska supreme court mentions the words "Sixth Amendment" and "Fourteenth Amendment", he failed to cite any authority construing these federal rights in his favor on the question presented -- the asserted pre-arrest right to interrupt an on-the-scene investigatory traffic stop by requesting an attorney.

Instead, Copelin's primary reliance was placed on prior decisions of the Alaska supreme court which construed the right to counsel granted by the Alaska constitution. He apparently made a knowing choice of legal theories, based on his estimate that his best chance of prevailing on the issue of a pre-arrest right to counsel lay in asking the Alaska supreme court to construe its own state constitution.

Under these facts, Copelin should not be allowed to question the Alaskas supreme court's ruling by raising federal grounds that were, as a practical matter, never presented to the Alaska court.

It is Copelin's burden to clearly assert a federal right in front

of the state court. When constitutional rights are at issue, it is Copelin's burden to clearly distinguish between claims under the state constitution as opposed to claims under the federal constitution. New York Central & Hudson River RR Co. v City of New York, 186 U.S. 269 (1902). See also Beck v Washington, 369 U.S. 541 at 549-554 (1962).

Copelin has failed to meet these burdens, and his petition should be dismissed for this reason.

II. COPELIN'S CLAIM THAT HE WAS "DENIED" THE RIGHT TO CONTACT AN ATTORNEY AT THE INVESTIGATORY STOP IS BASED ON A DUBIOUS CHARACTERIZATION OF THE FACTS FOUND BY THE HEARING JUDGE

Although Copelin claims that, during the traffic stop, he asked to contact an attorney and was denied this opportunity, the facts found by the hearing judge are a little different. As Copelin stated in his petition for hearing to the Alaska supreme court:

> [Judge Anderson] determined, as a factual matter, that Mr. Copelin first requested counsel when Trooper Hall instructed him to perform field sobriety tests at the scene of his arrest. He also ruled, however, that Trooper Hall did not verbalize any denial to the defendant's request until after their arrival at trooper headquarters. The court concluded that [the] denial of Mr. Copelin's right to counsel was not "effective" until after his arrival at trooper headquarters where a telephone would have been available to implement his right to contact

an attorney.

(Page A ----)

It thus appears, from Copelin's own recital of the facts, that while he might have mentioned his desire to contact an attorney when he was stopped, he did not voice objection to taking the field sobriety tests without first talking to his lawyer. Instead, the real confrontation over this issue occurred after Copelin had been arrested and taken to the station. There, as recited in Copelin v State (I), 659 P.2d 1206 at 1208-1209, Copelin insisted on talking to a lawyer before submitting to any further field sobriety tests or any breath test. When his request to telephone a lawyer was denied, Copelin grew angry and refused to submit to any tests.

The factual predicate for Copelin's due process claim is that, at the scene of the investigatory stop, he told the trooper he wanted to contact an attorney before performing any field sobriety tests, and the trooper flatly refused this request and directed Copelin

to proceed with the field sobriety tests. This characterization of the encounter between Copelin and Trooper Hall does not comport with the facts as found by the hearing judge. Instead, it appears that Copelin made no direct demand to see an attorney before proceeding any further, Trooper Hall did not directly refuse to allow Copelin to contact an attorney at the scene of the traffic stop, and Copelin voluntarily decided to submit to the field sobriety tests.

For this reason, the petition for certiorari should be denied.

III. COPELIN'S CLAIM IS ONE OF FIRST IMPRESSION UNDER FEDERAL LAW, AND THIS COURT SHOULD DEFER CONSIDERATION OF IT UNTIL LOWER COURTS HAVE HAD A CHANCE TO DEAL WITH IT

In his petition to this Court, Copelin relies on a handful of state court decisions for his claim that he had a right to consult an attorney before performing the field sobriety tests at the pre-arrest traffic stop. With one exception, these are the same cases that Copelin relied upon in his petition to the Alaska supreme court. And, as discussed in section I of the State's argument, these cases are not particularly on point.

(Copelin cites one new case in his petition to this Court: Smith v Cada, 562 P.2d 390 (Ariz. App. 1977). In that case, following his arrest for drunk driving, the defendant attempted to secure his release on bail so he could obtain a blood test; but, in contravention of a state statute, the police held the defendant incommunicado and did not

allow him to post bail even though he had the requisite cash with him.

Copelin cites no federal cases for his proposition that, during an investigative traffic stop, before any arrest, a police officer must cease his questioning (or in this case his request that the motorist perform field sobriety tests) at any time the motorist indicates a desire to talk to an attorney.

A ruling in Copelin's favor would have a major impact not only on traffic stops but also on other situations where police officers pursue investigative inquiries addressed to suspects who are not in custody for Miranda purposes -- situations such as seeking consent for a search of luggage or other personal possessions, or asking a person to explain his presence at a particular place or his possession of a particular article of property.

Before tackling such a modification of the law of investigatory stops, the Court should wait for lower courts to address the problem and try their hand at identifying and weighing the various

policy interests at stake.

CONCLUSION

Copelin's petition for writ of certiorari should be denied.

Respectfully submitted this 15th day of October, 1984.

NORMAN C. GORSUCH
ATTORNEY GENERAL OF THE
STATE OF ALASKA

By: David Mannheimer
David Mannheimer
Asst. Attorney General

APPENDIX

PERTINENT PORTIONS OF COPELIN'S PETITION FOR HEARING TO THE ALASKA SUPREME COURT

I. Prayer for Review.

COMES NOW the defendant, CHARLES G. COPELIN, by and through his attorneys, Birch, Horton, Bittner, Pestinger and Anderson, and, pursuant to the provisions of AS 22.07.030 and Rule 302(a) of the Alaska Rules of Appellate Procedure, hereby requests a review of Opinion No. 343 of the Court of Appeals of the State of Alaska, dated February 17, 1984, (hereinafter referred to as "Copelin III") wherein the court affirmed the defendant's District Court conviction for operating a motor vehicle while intoxicated. ...

II. Statement of Issues.

A motorist suspected of drunk driving is stopped by a State Trooper and instructed to exit his vehicle. The motorist complies and is directed by the

Trooper to perform various field sobriety tests as a means of determining the extent of his alcohol impairment. The motorist requests an opportunity to telephone his attorney before performing any sobriety tests. The request is denied. The tests are performed and the results are later used against the motorist at his drunk driving trial. The following issues are presented:

1. Did the trooper's actions deny the motorist's statutory right to contact counsel, guaranteed by AS 12.25.150 and Copelin v. State, 659 P.2d 1206 (Alaska 1983)?

2. Did the trooper's actions deny the motorist's constitutional right to contact counsel, guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution and Art. I, §§ 7 and 11 of the Alaska Constitution?

3. Assuming a statutory or constitutional violation, should the results of the field sobriety tests have been suppressed?

III. Statement of Facts

This petition stems from an OMVI conviction occurring on remand after the defendant's successful appeal in Copelin v. State, 659 P.2d 1206 (Alaska 1983) (hereinafter referred to as Copelin II). This case was also the subject of the Court of Appeals Opinion in Copelin v. State, 635 P.2d 492 (Alaska App. 1981) (hereinafter referred to as Copelin I.) The facts are largely undisputed.

On the evening of September 16, 1979, Charles Copelin was stopped on Tudor Road in Anchorage by Trooper Jeffrey Hall who suspected he was driving while intoxicated. Trooper Hall spoke briefly with Mr. Copelin and then directed him to exist his vehicle in order to perform field sobriety tests. Mr. Copelin complied and accompanied Trooper Hall to an area between the two vehicles (Copelin's and Hall's). Upon being directed by Trooper Hall to perform various sobriety tests, Mr. Copelin stated that he wished to telephone his

attorney before participating in any testing. Trooper Hall denied the request and again instructed Mr. Copelin to perform the tests. According to Trooper Hall, Mr. Copelin then performed all of the required tests. Trooper Hall recalls that Mr. Copelin's performance of the tests was unsatisfactory. (Mr. Copelin denies that he took the tests after making his request for counsel.) (T. 1, S. 1, Log 45-65; T. 1, S. 2, Log 454-660; T. 2, S. 1, Log 144-200.)

After completion of the sobriety tests, Mr. Copelin was formally arrested and transported to Trooper Headquarters where he was again instructed to perform field sobriety tests (this time, before a videotape camera) and was also requested to submit to a breathalyzer analysis. Mr. Copelin made numerous requests to Trooper Hall that he be permitted to contact his attorney, all of which were denied. He then refused a breathalyzer test, refused to perform any additional field sobriety tests and was later formally charged with violating the State's drunken driving laws. (Video-

tape; R. 1.)

On October 15, 1979, Mr. Copelin moved on several grounds to suppress any videotapes of his actions filmed by the State after his arrest. His primary contention was that any evidence gathered after Trooper Hall had refused his request to contact counsel was inadmissible. (R. 10-19.) Then District Court Judge Beverly Cutler denied the motion and permitted the showing of the entire videotape to the jury. However, she ordered that the volume on the videotape be turned off during portions of the tape depicting interrogation questions and references to Mr. Copelin's refusal to submit to a breathalyzer analysis. (Copelin II at 1209; n.6.)

On November 14, 1979, the case proceeded to trial before District Court Judge John Mason and on the following day the jury returned a verdict of guilty. (R. 96.) An appeal was made to the Superior Court and on June 26, 1983, Superior Court Judge Ralph Moody affirmed the conviction. (R. 164.) Judge Moody's decision was appealed to this court which

later transferred the case to the Court of Appeals. The Court of Appeals affirmed the conviction in Copelin I and a Petition for Hearing was thereafter filed with this court. This court accepted the petition and reversed the conviction in Copelin II on February 18, 1983. (R. 165-206.) The case was thereafter remanded to the District Court and the State elected to retry it.

Upon remand, Mr. Copelin moved the District Court to suppress all evidence gathered by the State after the denial of his first request for counsel, made at the scene of his arrest. (Mr. Copelin's 1979 motion to suppress had been directed principally towards the station house videotape.) (R. 210-214.) The State filed no Opposition to the motion and did not present any testimony at the June 17, 1983 evidentiary hearing.

District Court Judge Glen Anderson granted the motion in part. He determined, as a factual matter, that Mr. Copelin first requested counsel when Trooper Hall instructed him to perform field sobriety tests at the scene of his

arrest. He also ruled, however, that Trooper Hall did not verbalize any denial to the defendant's request until after their arrival at Trooper Headquarters. The court concluded that denial of Mr. Copelin's right to counsel was not "effective" until after his arrival at Trooper Headquarters where a telephone would have been available to implement his right to contact an attorney. (T. 1, S. 2, Log 34-126.)

As a result of the District Court's ruling, all evidence gathered by the State subsequent to Mr. Copelin's arrival at Trooper Headquarters was suppressed. All other evidence, including the officer's testimony concerning Mr. Copelin's performance of field sobriety tests after his invocation of right to counsel at the scene, was deemed admissible. The case proceeded to trial before District Court Judge William H. Fuld on July 6 and 7, 1983. The State's case in chief included the testimony of Trooper Hall concerning Mr. Copelin's purportedly poor performance on field sobriety tests taken at the scene of the

arrest. (T. 2, S. 1, Log 114-200.) The jury entered a verdict of guilty on July 7, 1983 and Mr. Copelin was sentenced by Judge Fuld to sixty (60) days imprisonment, with fifty (50) days suspended, a $500 fine and a one (1) year operator's license revocation.

An appeal was prosecuted to the Alaska Court of Appeals which affirmed the conviction on February 17, 1984. Copelin III. Relying upon Copelin II and Anchorage v. Geber, 592 P.2d 1187 (Alaska 1979), the court held that Mr. Copelin's statutory right to counsel did not attach until he was formally arrested. Since his first request for counsel and the subsequent field sobriety tests occurred prior to formal arrest, the court concluded that his statutory right to counsel was not violated. Relying upon Svedlund v. Anchorage, 671 P.2d 378 (Alaska App. 1983), the court also held that a motorist has no constitutional right to contact counsel prior to field sobriety tests or breathalyzer examinations.

IV. Points and Authorities

A. Statutory Right to Counsel

In Copelin II, this court recognized that a motorist arrested for drunk driving is entitled under AS 12.25.150(b) and Alaska Criminal Rule 5(b) to a reasonable opportunity to contact his attorney before deciding whether to perform sobriety tests. Id. at 1208, 1215, AS 12.25.150(b) provides in pertinent part:

> Immediately after an arrest, a prisoner shall have the right to telephone or otherwise communicate with his attorney and any relative or friend, and any attorney at law entitled to practice in the courts of Alaska shall, at the request of the prisoner, have the right to immediately visit the person arrested.

Alaska Criminal Rule 5(b) provides:

> Rights of prisoner to communicate with attorney or other person. Immediately after his arrest, the prisoner shall have the right forthwith to telephone or otherwise to

> communicate with both his attorney and any relative or friend. Any attorney at law entitled to practice in the courts of Alaska, at the request of either the prisoner or any relative or friend of the prisoner, shall have the right forthwith to visit the prisoner in private.

The State argued below, and the Court of Appeals agreed, that a motorist's statutory right to counsel is not implemented until after a formal arrest has occurred. The defendant disagrees and submits that the term "arrest" as used in the above statute and rule should be interpreted to mean "in custody". Since it is undisputed that Mr. Copelin was in a custodial setting when he requested counsel, his right to telephone counsel was properly triggered under the statute and rule.

The defendant urges the court to find a defendant's statutory right to counsel co-extensive with the collateral constitutional right recognized in Blue v. State, 558 P.2d 636 (Alaska 1977).

In Blue, this court extended

the constitutional right to counsel in Alaska to the investigatory stage by requiring the presence of a suspect's attorney at pre-indictment line-ups, absent exigent circumstances. The defendant in Blue was not formally under arrest when the line up occurred but the court nevertheless determined that he was "in custody" for purposes of determining his constitutional right to counsel. Note the following language on page 642 of the Opinion:

> In balancing the need for prompt investigation against a suspect's right to fair procedures, we hold that a suspect who is in custody is entitled to have counsel present at a pre-indictment line-up unless exigent circumstances exist so that providing counsel would unduly interfere with a prompt and purposeful investigation. [Id. at 642; emphasis added.]

This language was explained in footnote 9 to the Opinion, which reads:

> Blue, although not formally under arrest, was in custody in that he was detained and not at liberty to leave. [cit.om.]

[Id. at 642.]

This language in Blue was recently reaffirmed by this court in Walker v. Alaska, 652 P.2d 88 (Alaska 1982). Note the following language on page 96 of the Opinion:

> Although at the time of the identification Walker was not formally under arrest, he was "in custody in that he was detained and not at liberty to leave." [citing Blue with approval.]

In the present case, Trooper Hall testified that he observed Mr. Copelin driving his car erratically. Upon stopping the vehicle, Hall observed that Mr. Copelin had blood shot eyes, slurred speech, and emitted a strong odor of alcohol. When asked for his operator's license, Mr. Copelin purportedly presented his VISA card. When Mr. Copelin exited his vehicle upon instructions from Trooper Hall, he purportedly stumbled directly into the traffic lane of Tudor Road. (T. 1, S. 2, Log 454-660.] Clearly at that point, Mr. Cope-

lin, like the defendants in Blue and Walker was not free to leave the trooper's presence and control and, accordingly, was "in custody".

The distinction drawn by the State and the Court of Appeals between "custody" and "arrest" in determining a motorist's statutory right to counsel, promotes form over substance. For example, in the present case, a motorist in custody, unequivocally expressed his desire to communicate with counsel prior to participating in any sobriety testing. The request was denied and the motorist was forced to perform the tests without the aid of telephone advice from his attorney. The fact that the officer had not yet stated "you are under arrest" should not affect whether the right to a telephone call existed at that point.

The clear legislative intent behind the statute is to provide suspects in custody with telephone access to counsel. Following the Court of Appeals approach, allowing telephone access only after a formal arrest, will encourage police officers to frustrate this legis-

lative intent by engaging in a game of semantics with the suspect--delaying formal arrest as long as possible in order to thwart the suspect's desire to telephone his attorney.

B. Constitutional Right to Contact Counsel.

As indicated above, in Blue and Walker this court recognized that a suspect in custody is entitled to counsel at the investigatory stage of a prosecution absent exigent circumstances. Of particular relevance to this case, is the language at footnote 12 to Blue recognizing that even where exigent circumstances exist, if the suspect requests an attorney, "he should be provided an opportunity to call one." Id. at 643. Consistent with Blue, this court held in Loveless v. State, 592 P.2d 1206 (Alaska 1979), that the constitutional right to counsel under the Alaska Constitution is to be broadly interpreted "to protect the accused during proceedings that are investigatory in nature and which are conducted in an adversary context." Id.

at 1210; citing Blue and Roberts v. State, 558 P.2d 636 (Alaska 1969).

The Court of Appeals rejected the defendant's argument that Blue was controlling, relying principally upon Svedlund v. Anchorage, supra. In Svedlund, the defendant argued that there was a constitutional right to contact an attorney prior to deciding whether or not to submit to a breathalyzer test. Citing Anchorage v. Geber, 592 P.2d 1187 (Alaska 1979), the court determined that a breathalyzer exam is not a "critical stage" at which the Alaska and Federal Constitutions require counsel's presence. Id. at 382.) The Svedlund court emphasized several times that the defendant had not requested to telephone his attorney and that the police had not interfered with any attempt by him to obtain counsel. Id.

In Geber, this court held that a motorist need not be advised of his right to counsel prior to sobriety testing. Id. at 1192. As in Svedlund, the defendant in Geber had not requested an opportunity to contact counsel.

The present case is distinguishable from Svedlund and Geber in one important respect: Mr. Copelin did request an opportunity to contact counsel. The importance of this distinction was noted by this court at footnote 12 of Copelin II, which reads in pertinent part:

> While we held [in Geber] that the police have no duty to advise a suspect of any right to counsel, we did not hold that the police may refuse the specific requests to contact counsel that were made in the instant cases. Other courts have recognized that there is a vast difference between a flat refusal to afford access to counsel after it is requested and a failure to advise or warn a defendant of his rights. [cit.om.] Secondly, while we held in Geber that there is no right to have an attorney present at the field sobriety tests, we did not hold that there was no right merely to contact or communicate with counsel before deciding whether or not to submit to such tests. [Id. at 1211.]

Implicit in the emphasized language is that while a motorist has no constitutional right to have counsel present at sobriety testing, there is a right to attempt to contact private counsel by telephone upon request. Indeed, the Court of Appeals recognized in Yerrington v. Anchorage, _____ P.2d _____ (Alaska App. 1983) (Slip Op. No. 326; December 30, 1983), that Copelin II had limited Geber to its facts. Note the following excerpt from page 4 of the Slip Opinion:

> Second, Copelin disapproved a practice arguably sanctioned by three prior decisions of the Alaska Supreme Court: Graham v. State, 633 P.2d 211, 215, 217 (Alaska 1981)...Palmer v. State, 604 P.2d 1106, 1110 (Alaska 1979)...and Anchorage v. Gebber, 592 P.2d 1187, 1188 (Alaska 1979) (the court held that the police have no duty to advise a suspect of any right to counsel before administering field sobriety tests and further held that a drunk driving suspect had no right to have an attorney present at field sobriety test.)

The defendant is not suggesting that the State be required to provide counsel to a motorist in custody under all circumstances; or that the defendant has a right to counsel's presence at all times during the investigatory stage of a prosecution; or even that the State is required to advise a defendant of a right to counsel during sobriety testing. Rather, he is merely positing that if a motorist already has his own counsel and indicates to the officer his desire to communicate with him, the police officer should not prevent him from doing so. As this court and others courts have recognized, there is a "vast difference between a flat refusal to afford access to counsel after it is requested and a failure to advise or warn a defendant of his rights." Copelin II at 1211, n. 12, quoting from People v. Craft, 270 N.E.2d 297, 300 (N.Y. 1971). A number of cases from other jurisdictions have recognized that once a motorist requests an opportunity to confer with counsel prior to sobriety testing, he must be given an opportunity to do so. These courts have

used either a traditional Sixth Amendment/Right to Counsel analysis or a Fourteenth Amendment/Due Process rationale. See e.g., City of Tacoma v. Heater, 409 P.2d 1867 (Wa. 1966); State v. Welch, 376 A.2d 351 (Vt. 1977); State v. Hill, 178 S.E.2d 462 (N.C. 1971) Prideaux v. State, 247 N.W.2d 385 (Minn. 1976) (dicta); Hall v. Secretary of State, 261 So.2d 475 (Miss, 1972); Heles v. State of South Dakota, 530 F. Supp. 646 (D.S.D. 1982), vac. as moot, 682 F.2d 201.

Mr. Copelin urges this court to follow these cases and hold that once a motorist in custody has requested an opportunity to contact his attorney, all sobriety testing should cease for a limited period of time to provide him a reasonable opportunity to telephone his attorney. If no contact can be made within that reasonable time, the motorist will have to make the decision whether to perform the testing on his own.

C. Remedy

. . .

[The remainder of Copelin's petition for hearing, dealing with the proper remedy for the asserted violation of law, and the reasons why the Alaska supreme court should exercise its discretionary jurisdiction in Copelin's case, is omitted.]

No. 84-30

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

CHARLES COPELIN,

Petitioner,

vs.

STATE OF ALASKA,

Respondent.

ON PETITION FOR WRIT
OF CERTIORARI TO THE
COURT OF APPEALS OF ALASKA

PETITIONER'S REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

DANIEL WESTERBURG
BIRCH, HORTON, BITTNER,
PESTINGER and ANDERSON
1127 West Seventh Avenue
Anchorage, Alaska 99501
(907) 276-1550
Attorneys for Petitioner

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Argument

I. THE DEFENDANT PROPERLY PRESERVED THE FOURTEENTH AMENDMENT ISSUE.

The State first argues that Mr. Copelin did not properly preserve the Fourteenth Amendment/Fundamental Fairness issue in the courts below. The State is mistaken.

A. The Issue Was Raised Before the Alaska Court of Appeals.

In his opening brief to the Alaska Court of Appeals, Mr. Copelin specifically relied upon the Fourteenth Amendment's guarantee of fundamental fairness in support of his argument that he should have been allowed to call his attorney.

The first two paragraphs of "Section A" of Mr. Copelin's Court of Appeals brief read as follows:

A. The Defendant Had A Constitutional Right to Consult With Counsel Before the Administration of Field Sobriety Tests.

The defendant has repeatedly argued in this case that he had a constitutional right to at least attempt to communicate with counsel before being administered alcohol sobriety tests. Rather than repeat those arguments in detail here, the defendant incorporates by reference his Opening and Reply Briefs at 7-17; 1-15, respectively, filed with this court in Copelin I and relied upon by the Alaska Supreme Court in Copelin II.

In those briefs, the defendant relied upon a number of cases from other jurisdictions recognizing the constitutional right of an OMVI suspect to confer by telephone with counsel prior to the administration of alcohol sobriety tests, provided that contact can be made within a reasonable period of time. These cases follow either a traditional Sixth Amendment-type analysis or a Fourteenth Amendment/Fundamental Fairness Approach. (In addition to the defendant's earlier briefs, see generally, Annot., Denial of Accused's Request for Initial Contact With Attorney--Drunk Driving Cases, 18 A.L.R. 4th 705 (1982).) [emphasis added.]

The last paragraph of Section A of the brief also refers to the fundamental fairness argument:

> As extensively argued in prior briefs filed with this court, a limited right of an OMVI suspect to attempt to confer telephonically with counsel prior to the administration of alcohol sobriety tests will serve to protect the suspect's right to counsel and fundamental fairness, while not seriously impeding the State's ability to gather inculpatory evidence. [emphasis added.]

Mr. Copelin's Reply Brief also discussed the fundamental fairness issue. Note the following excerpt from pps. 5-6 of the Brief:

> II. CONSTITUTIONAL RIGHT TO TELEPHONE COUNSEL.
>
> A. "On the Scene Questioning" Exception to the Miranda Rule.
>
> * * *
>
> First, contrary to the State's assertions, the right to counsel guaranteed under Miranda v. Arizona, 384 U.S. 436 (1965), concerns a suspect's right to counsel under the Fifth, not Sixth

> Amendment. See discussion in Edwards v. Arizona, 451 U.S. 477 (1981). Accordingly, the fact that the subject of a routine traffic stop may not be entitled to counsel under Miranda has no bearing on the Sixth and Fourteenth Amendment right to counsel claims being raised here. [emphasis added.]

Further, in Mr. Copelin's opening brief (excerpted supra at 2-3), he incorporated by reference the constitutional arguments raised in his opening and reply briefs filed in an earlier appeal in the same case. The court formally took judicial notice of these earlier briefs in an order dated October 20, 1983. (See Appendix A.)

One of these earlier briefs was Mr. Copelin's November 10, 1980 opening brief filed in his first appeal. The constitutional right to counsel issue was discussed at pps. 7-17. Pertinent to the Fourteenth Amendment/Fundamental Fairness argument, is the following excerpt from pps. 15-17:

In Hall v. Secretary of State, 231 N.W.2d 396 (Mich. App. 1975), a license revocation proceeding involving Michigan's implied consent statute, the Court of Appeals of Michigan reversed a motorist's license revocation after learning that the defendant had been denied his request to consult with counsel when that request was made before deciding whether to take or to refuse the breathalyzer analysis. The court noted that the ability to consult with one's attorney before deciding whether to take or refuse a breathalyzer analysis was a fundamental right, protected under the Fourteenth Amendment to the United States Constitution. Similar results were reached by a number of lower courts in Ohio during the early 1970's. [cit.om.]

In People v. Gursey, 239 N.E.2d 351 (N.Y. 1968); North Carolina v. Hill, 178 S.E.2d 462 (N.C. 1971); and State v. Welch, 376 A.2d 351 (Vt. 1977), the Supreme Courts of New York, North Carolina and Vermont, respectively, recognized the constitutional right of a criminal defendant in an OMVI proceeding to confer with counsel before deciding whether to take or refuse a breathalyzer analysis. (Cf. Seders v. Powell, 250 S.E.2d 690 (N.C. 1979).)

> Such a limited right to call and briefly confer with counsel after one's arrest for driving while under the influence, before complying with intoxication tests, will protect both a motorist's right to counsel as well as his due process right to fundamental fairness, and will not unduly delay the ultimate taking of the tests. [cit.om.; emphasis added.]

The March 10, 1981 reply brief filed by Mr. Copelin in the first appeal was also judicially noticed by the Court of Appeals. (Appendix A.) Pages 11-15 of that brief specifically discussed the Fourteenth Amendment/Fundamental Fairness issue. The following excerpt should serve as verification:

> B. Right to Fundamental Fairness.
>
> Even if this court refuses to recognize an Art. I, Section 11/Sixth Amendment Right to Counsel under a traditional "right to counsel" analysis, the defendant urges the court to recognize that a right to attorney access exists after a

> suspect requests counsel, under a Fourteenth Amendment/"Fundamental Fairness" approach.
>
> * * *
>
> Throughout both the trial and appellate level, the defendant has consistently argued that once a suspect requests an attorney, he should be permitted to contact an attorney to assist him in his defense as a matter of fundamental fairness. Such an argument is based upon a Fourteenth Amendment/Art. I, Section 7 analysis, and not a Sixth Amendment/Art. I, §11 analysis. [emphasis added.]

The State's assertion that the fundamental fairness issue was not raised before the Court of Appeals is simply wrong.

B. The Fourteenth Amendment Issue Was Raised Before the Alaska Supreme Court.

The State also argues that Mr. Copelin's federal constitutional claims were not raised before the Alaska Supreme Court in his Petition for Hearing. The State is again mistaken. The second

issue raised in Mr. Copelin's Petition reads:

> 2.) Did the trooper's actions deny the motorist's constitutional right to contact counsel, guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution and Art. I, §§ 7 and 11 of the Alaska Constitution?

The issue could not have been more plainly stated. The fundamental fairness argument was later specifically discussed at pps. 10-11 of the Petition:

> The defendant is not suggesting that the State be required to provide counsel to a motorist in custody under all circumstances; or that the defendant has a right to counsel's presence at all times during the investigatory stage of a prosecution; or even that the State is required to advise a defendant of a right to counsel during sobriety testing. Rather, he is merely positing that if a motorist already has his own counsel and indicates to the officer his desire to communicate with him, the police officer should not prevent him from doing so. As this court in [sic] others

> courts have recognized, there is a "vast difference between a flat refusal to afford access to counsel after it is requested and a failure to advise or warn a defendant of his rights." [cit.om.]
>
> A number of cases from other jurisdictions have recognized that once a motorist requests an opportunity to confer with counsel prior to sobriety testing, he must be given an opportunity to do so. These courts have used either a traditional Sixth Amendment/ Right to Counsel analysis or a Fourteenth Amendment/Due Process Rationale. [cit.om.]
>
> Mr. Copelin urges this court to follow these cases and hold that once a motorist in custody has requested an opportunity to contact his attorney, all sobriety testing should cease for a limited period of time to provide him a reasonable opportunity to telephone his attorney. If no contact can be made within that reasonable time, the motorist will have to make the decision whether to perform this testing on his own. [emphasis in original.]

The cases cited by Mr. Copelin in his Petition as supporting his "fundamental fairness" argument all rely at least in part on the federal

constitution: Hall v. Secretary of State, 231 N.W.2d 396 at 398-400 (Mich. App. 1975); Scarborough v. State, 261 So.2d 475 at 479-480 (Miss. 1972); City of Tacoma v. Heater, 409 P.2d 867 at 869-870 (Wa. 1966); Heles v. State of South Dakota, 530 F.Supp. 646 at 652 (D.S.D. 1982), vac. as moot, 682 F.2d 201; State v. Hill, 178 S.E.2d 462 at 465 (N.C. 1971); State v. Welch, 376 A.2d 351 at 354 (Vt. 1977); and Prideaux v. State, 247 N.W.2d 385 at 387-391 (Minn. 1976) (dicta).

Mr. Copelin did not limit his argument to state statutory and constitutional arguments, as represented by the State in its RESPONSE.

C. The Court of Appeals Decided the Federal Question Raised.

The State correctly points out that the Alaska Court of Appeals did not consider in detail Mr. Copelin's federal constitutional claims. (See Copelin v.

State, 676 P.2d 608, 609 (Alaska App. 1984).) Nevertheless, the court unquestionably decided the federal issues raised. The last paragraph of the court's opinion states:

> Copelin nevertheless argues that he had a constitutional right to contact counsel before being required to perform field sobriety tests. He relies upon Walker v. State, 652 P.2d 88 (Alaska 1982) and Blue v. State, 558 P.2d 636 (Alaska 1977). In Svedlund v. Anchorage, 671 P.2d 378, 382 (Alaska App. 1983), we rejected a similar argument and held that any right to contact counsel prior to taking field sobriety tests or submitting to a breathalyzer examination was a creature of statute and not the state or federal constitutions. In Svedlund, we concluded that Blue, and by implication, Walker were distinguishable. Id. We adhere to that decision. [Id.; emphasis added.]

The State emphasizes that the Court referred to two cases relied upon by Mr. Copelin, Walker v. State, supra, and Blue v. State, supra, which construe Alaska's constitutional guarantee to counsel. In

referring to those cases, however, the court certainly did not imply that Mr. Copelin had relied upon only Walker and Blue. In fact, as has been pointed out above, other cases, including many based upon the Fourteenth Amendment, were specifically relied upon by Mr. Copelin.

The defendant has consistently and repeatedly raised his Fourteenth Amendment/Fundamental Fairness argument before the Alaska courts. The State has no basis for suggesting otherwise.

II. MR. COPELIN'S REQUEST TO TELEPHONE COUNSEL WAS DENIED BY THE TROOPER.

The State takes issue with the defendant's assertion that the arresting trooper "denied" Mr. Copelin's request to telephone his lawyer. (State's Response at 23-25.) The State apparently does not dispute the findings of fact made by the trial court on the trooper's actions; it takes issue only with the conclusion that

the defendant has drawn from those findings.

The case was submitted to the Alaska Court of Appeals essentially on a stipulated statement of facts. (In its brief filed with the Court of Appeals, the State accepted the Statement of Facts contained in the defendant's brief. See Appendix B.)

The "Statement of Facts" portion of the defendant's brief pertaining to the confrontation between Mr. Copelin and Trooper Hall reads as follows:

> On the evening of September 16, 1979, the defendant was stopped on Tudor Road in Anchorage by Trooper Jeffrey Hall on suspicion of operating a motor vehicle while under the influence of intoxicating liquor. After making a preliminary determination that the defendant was intoxicated, Trooper Hall requested the defendant to perform various standard field sobriety tests at the scene. The defendant indicated to the trooper that he wished to telephone his attorney before agreeing to perform any sobriety tests.

> The defendant's requests were ignored by the trooper and he was again instructed to complete the tests. According to Trooper Hall, the defendant then performed all of the required tests, but did so poorly. (The defendant denied that he took the tests after making his request for counsel.) [Record cit.om.; emphasis added.]

The State apparently does not dispute that Mr. Copelin's request to contact his attorney went unheeded by the arresting officer. Instead, the State argues that a police officer does not "deny" a motorist's request for counsel if he simply ignores it. The State's argument suggests that a "denial" can take place only where the police officer somehow verbalizes it. Presumably, if the officer stands mute in the face of a request for counsel (as did Trooper Hall), no "denial" has taken place.

The State's argument cannot be taken seriously. Its adoption would encourage police officers to refuse to respond to

requests for counsel, in order to later claim (as does the State here) that no "denial" of the request took place. Surely, important constitutional rights cannot be so easily circumvented. The defendant was unable to locate any reported decision where a party took this remarkable position.

Resolution of Mr. Copelin's petition should not turn upon a question of semantics. It is undisputed that Mr. Copelin specifically asked the trooper for permission to call his lawyer and the request went ignored. The distinction between "denying" a request and "ignoring" a request largely escapes the defendant.

III. THE QUESTION PRESENTED IS NOT ONE OF FIRST IMPRESSION.

The State claims that Mr. Copelin's petition has raised a question of first impression. That is not true. The question of when, and under what

circumstances, a motorist in custody is entitled to telephone his lawyer has been the subject of literally dozens of cases. Many of these decisions have been collected in several recent A.L.R. Annotations: Annot., Denial of Accused's Request for Initial Contact With Attorney--Drunk Driving Cases, 18 A.L.R.4th 705 (1982); Annot., Denial of Accused's Request for Initial Contact With Attorney--Cases Involving Offenses Other than Drunk Driving, 18 A.L.R.4th 743 (1982); and Annot., Denial of, Or Interference With, Accused's Right to Have Attorney Initially Contact Accused, 18 A.L.R.4th 669 (1982).

As explained supra at pp. 9-10, many of these cases have interpreted the Fourteenth and Sixth Amendments of the U.S. Constitution and have not relied solely upon state statutory or constitutional law.

The State makes much of the fact that Mr. Copelin asked to call his lawyer before he was formally arrested. According to the State, this fact somehow makes this case special. The defendant fails to appreciate the importance of the distinction between "custody" and "arrest" for determining a due process right to counsel. (Cf. Blue v. State, 558 P.2d 636, 642, n.9. (Alaska 1977).)

An analogy can be drawn to the Miranda warning requirement which is triggered, not when a suspect is formally arrested, but when he has been "taken into custody or otherwise deprived of his freedom by the authorities in any significant way." Miranda v. Arizona, 384 U.S. 436, 478 (1966).

Mr. Copelin either had the right to telephone his lawyer or he did not. He urges the court not to resolve the issue on the basis of a distinction between

"custody" and "arrest" which is largely one of form over substance.

Conclusion

This case presents an excellent opportunity for the court to determine when, and under what circumstances, a police officer may ignore a motorist's request to call his lawyer. Because of the large number of drunk driving arrests which occur each year in this country, the question has arisen dozens of times in the state courts with varying results. Mr. Copelin urges the court to accept review of this case and hold that an arresting officer may not ignore with impunity the request of a motorist in custody to call his lawyer.

For all of these reasons, Mr. Copelin respectfully requests that his Petition for Writ of Certiorari be granted.

DATED this ____ day of October, 1984, at Anchorage, Alaska.

BIRCH, HORTON, BITTNER,
PESTINGER and ANDERSON
Attorneys for Petitioner

BY:_____
Daniel Westerburg

APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF ALASKA

CHARLES G. COPELIN, Appellant, vs. STATE OF ALASKA, Appellee.	)	[October 5, 1983 Court Date Stamp]

Case No. A-35

MOTION TO TAKE JUDICIAL NOTICE OF PRIOR BRIEFS

COMES NOW the Appellant, CHARLES G. COPELIN, by and through his attorneys, Birch, Horton, Bittner, Pestinger and Anderson, and hereby moves this court for an ORDER judicially noticing the following briefs filed by the parties in Copelin v. State, 635 P.2d 492 (Alaska App. 1981) (file no. 5453):

1. Brief of Appellant, Charles G. Copelin, filed November 10, 1980.

2. Brief of Appellee, filed January 30, 1981.

3. Reply Brief of Appellant, Charles G. Copelin, filed March 10, 1981.

This motion is based upon the accompanying MEMORANDUM IN SUPPORT.

DATED this _____ [sic] day of October, 1983, at Anchorage, Alaska.

BIRCH, HORTON, BITTNER,
PESTINGER and ANDERSON
Attorneys for Appellant

BY: /s/ Daniel Westerburg
Daniel Westerburg

[Certificate of Service]

O R D E R

IT IS SO ORDERED. [October 20, 1983 Court Entry Stamp]

DATED: October 20, 1983

/s/ Carol L. Vance
Carol L. Vance
Deputy Clerk

APPENDIX B

IN THE COURT OF APPEALS FOR THE
STATE OF ALASKA

CHARLES G. COPELIN,	)
	)
Appellant,	)
	)
vs.	)
	)
STATE OF ALASKA,	)
	)
Appellee.	)
	)

Case No. A-35

[Excerpt From Appellee's
October 1983 Brief at p. 4]

STATEMENT OF THE CASE

The state accepts appellant's statement of the case.